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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 323

NEW YORK LIFE INSURANCE COMPANY,
PETITIONER,

vs.

STELLA JANE GAMER, AS EXECUTRIX OF THE WILL OF E. WALTER GAMER, ALSO KNOWN AS EDWARD W. GAMER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

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Both of Butte, Montana,
Attorneys for Appellee and Plaintiff [1*]

In the District Court of the United States in and for the District of Montana.

No. 847

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Defendant.

BE IT REMEMBERED that on September 6, 1933, the Complaint of the plaintiff with Exhibit

*Page numbering appearing at the foot of page of original certified Transcript of Record.

"A" attached thereto was filed herein, said Complaint and Exhibit "A" except the schedule of "Monthly and Annual Payments for each $1,000 of Proceeds of Policy", a part of said Exhibit "A", being in the words and figures following, to wit:

[2]

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

No. 34,543
Filed Jul. 18, 1933.
Summons issued.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff above named, and for cause of action against the defendant complains and alleges:

1.

That the defendant above named, New York Life Insurance Company, is now and at all times herein

alleged has been and was a foreign corporation, duly organized and existing, and engaged in the business of making and issuing life insurance contracts insuring lives in the State of Montana, and was and is duly qualified, under the laws of the State of Montana, to engage in said business in the State of Montana.

2.

That E. Walter Gamer, who was also known as Edward W. Gamer, died at Butte, Montana, on the tenth day of April, 1933, and that said deceased at the time of his death was a resident of Silver Bow County, State of Montana, and that said E. Walter Gamer, who was also known as Edward W. Gamer, left a last will and testament, and that thereafter such proceedings were had that on the 6th day of May, 1933, the last will of said E. Walter Gamer, also known as Edward W. Gamer, was by order and decree of the District [3] Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, duly given and made, duly admitted to probate in said Court, and this plaintiff, Stella Jane Gamer, was duly appointed executrix of the will of said E. Walter Gamer, also known as Edward W. Gamer, by said order and decree; that on said 6th day of May, 1933, said Stella Jane Gamer duly qualified as such executrix,

and on said day Letters Testamentary of the estate and will of said E. Walter Gamer, also known as Edward W. Gamer, were duly issued to said Stella Jane Gamer out of said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and that on said day she entered upon the duties of executrix of said will and estate, and that she has ever since the said 6th day of May, 1933, been, and now is, the duly qualified and acting executrix of the will of said E. Walter Gamer, also known as Edward W. Gamer, deceased, and that her Letters Testamentary have not been revoked and are in full force and effect. That E. Walter Gamer was also known as and sometimes called Edward W. Gamer, and that said E. Walter Gamer and Edward W. Gamer was one and the same person.

3.

That on the tenth day of January, 1927, at Butte, Montana, the defendant, in consideration of the payment to it of an annual premium of the sum of One Hundred Seventy Two and 70/100 dollars ($172.70), made, executed and delivered to said Edward W. Gamer, who was also known as E. Walter Gamer, its policy of insurance in writing, and thereby insured the life of said Edward W. Gamer in the sum of Twenty Thousand Dollars ($20,000.00), namely, Ten Thousand Dollars ($10,000.00), the face of said policy, or Twenty Thousand dollars ($20,000.00), double the face of

the policy, if the death of said deceased within the term provided of said policy, to-wit: within seven (7) years from the date of making and issuing [4] said policy, resulted from accident as defined under "Double Indemnity" in said policy of insurance, all payable to the executors, administrators or assigns of the said insured, Edward W. Gamer, as beneficiary.

A true, correct and complete copy of said policy of insurance is hereto attached, marked Exhibit "A", and is hereby made a part of this complaint.

4.

That this plaintiff, Stella Jane Gamer, as executrix of the will of E. Walter Gamer, also known as Edward W. Gamer, deceased, is the beneficiary named in said policy of insurance.

That all premiums which accrued on said policy of insurance to the date of death of said Edward W. Gamer had been paid prior to his death, and the said policy of insurance ever since the execution and delivery thereof, as aforesaid, has been, and is now, in full force and effect, and that all conditions in said policy required to be performed by said Edward W. Gamer, and by plaintiff as such executrix and beneficiary therein, have been duly performed by said Edward W. Gamer, and by plaintiff as beneficiary, and that there was no default in the payment of premiums on said policy. That no assignment of said policy is now or was in effect at the time of death of said deceased.

5.

That said Edward W. Gamer, the insured named in said policy of insurance, died at Butte, Montana, on the tenth day of April, 1933, and that the death of the said insured Edward W. Gamer resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury, and within the term period, to-wit: within seven (7) years from the date of making and issuing said policy. [5]

That the death of said insured did not result from self-destruction or from the taking of poison or inhaling gas, or from committing an assault or felony, or from war or any act incident thereto, or from engaging in riot or insurrection, or from participation as a passenger or otherwise in aviation or aeronautics, or, directly or indirectly, from infirmity of mind or body, or from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury.

That the death of said Edward W. Gamer, resulted directly from the accidental discharge of a fire-arm, to-wit: a rifle, the bullet from said rifle so accidentally discharged striking him and causing his death.

6.

That on or about the 8th day of May, A. D. 1933, this plaintiff furnished and delivered to defendant due proof of the death of said insured,

and due proof that the death of said insured, Edward W. Gamer, resulted directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury, and within the term period of said policy, to-wit; that said death resulted from the accidental discharge of a fire-arm as alleged in paragraph 5 of this complaint.

7.

That because, as hereinabove alleged, the death of said Edward W. Gamer resulted from accident as defined under "Double Indemnity" in said policy of insurance, plaintiff is entitled, under the terms of said policy, to double the face of said policy, to-wit: to the sum of Twenty Thousand Dollars ($20,000.00).

8.

That there is now due, owing and wholly unpaid from defen- [6] dant to plaintiff, as executrix of the will of said E. Walter Gamer, also known as Edward W. Gamer, deceased, on said policy of insurance, the sum of Twenty Thousand Dollars ($20,000.00), and that plaintiff has demanded said sum of Twenty Thousand Dollars ($20,000.00) from defendant, but that defendant fails and refuses to pay the same.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Twenty Thousand Dollars ($20,000.00), and interest, and for her costs and expenses in this action necessarily expended.

CARL J. CHRISTIAN

Attorney for Plaintiff. [7]

State of Montana,
County of Silver Bow—ss.

CARL J. CHRISTIAN, being first duly sworn, on oath deposes and says:

That he is the attorney of and for Stella Jane Gamer, as executrix of the will of E. Walter Gamer, also known as Edward W. Gamer, deceased, the plaintiff in the foregoing action and complaint named, a party to said action;

That said Stella Jane Gamer, plaintiff in said action, is absent from the County of Silver Bow, State of Montana, the County in which her attorney, this affiant, resides; that affiant has read the foregoing complaint and knows the contents thereof, and that all the matters stated in said complaint are true to the best knowledge, information and belief of this affiant, such attorney for plaintiff.

CARL J. CHRISTIAN

Subscribed and sworn to before me this 17th day of July, A. D. 1933.

[Notarial Seal] FRANCIS P. KEELY
Notary Public for the State of Montana residing at Butte, Montana. My commission expires March 13, 1935.

[Endorsed]: Filed September 6, 1933. C. R. Garlow, Clerk. [8]

EXHIBIT "A".

NEW YORK LIFE INSURANCE COMPANY

A Mutual Company

Agrees to Pay

to the Executors, Administrators or Assigns of the Insured, or to the duly designated Beneficiary (with right on the part of the Insured to change the Beneficiary in the manner provided herein) TEN THOUSAND Dollars (the face of this policy) upon receipt of due proof of the death of EDWARD W. GAMER, the Insured within seven years from the date this Policy takes effect (hereinafter called the term period); or TWENTY THOUSAND Dollars (double the face of this policy) if such death within the term period resulted from accident as defined under "Double Indemnity" on the second page hereof and subject to the provisions therein set forth.

This contract is made in consideration of the payment in advance of the sum of $172.70, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Twenty-ninth day of December Nineteen Hundred and Twenty-seven, and of a like sum on said date and every twelve calendar months thereafter until premiums for seven full years in all shall have been paid from the date on which this Policy takes effect, or until the prior death of the Insured.

This Policy takes effect as of the Twenty-ninth day of December, Nineteen Hundred and Twenty-six, which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Tenth day of January Nineteen Hundred and Twenty-seven.

DARWIN P. KINGSLEE
President.

SEYMOUR M. BALLARD
Secretary.

.....
Registrar.

925-12
Term
D. I.
Age 45
Examined WC
PMA HS

Insurance Payable at Death if within 7 years. Premiums Payable for 7 years. Double Indemnity for Fatal Accident. Annual Participation in Surplus. Convertible. Not Renewable. [9]

DOUBLE INDEMNITY.

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and

accidental means and occurred within ninety days after such injury and within the term period.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or, directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

The total premium stated in this Policy includes a *** annual premium of $10.00 for the Double Indemnity Benefit.

PARTICIPATION IN SURPLUS—DIVIDENDS.

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter, such surplus as shall have been apportioned by the Company to this Policy shall at the option of the Insured be either

(a) Paid in cash; or

(b) Applied toward payment of premiums; or

(c) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent compounded and credited annually. Such accumulated dividends may be withdrawn in cash by the Insured on any anniversary of the Policy or shall be payable at the expiration of the term period to the Insured or at prior death of the Insured to the person entitled to its proceeds.

If no option is selected, the dividend shall accumulate to the credit of the Policy (Option c).

EXCHANGE PRIVILEGE.

On any anniversary of this Policy, not later than 5 years from the date on which it takes effect, upon written request from the Insured, this Policy may be exchanged without medical re-examination for a Policy of Insurance upon the Ordinary Life plan with Double Indemnity and without Disability benefits as now issued by the Company, provided that the amount of insurance shall not be increased, that this Policy be duly surrendered in exchange for such new Policy, and that any sum due on such exchange be paid while this Policy is in force or within thirty days thereafter.

Such change, at the option of the Insured, may be effected in either of the following ways:

First.—This Policy may be changed as above, upon payment of a sum equal to the difference between the premiums on the Ordinary Life Policy

and the premiums on this Policy for the same amount of insurance as that of the Ordinary Life Policy, with interest at the rate of six per centum per annum from the due date of each premium to the date when the change is made; allowance will be made for any larger cash dividends on the Ordinary Life Policy. The Ordinary Life Policy will take effect as of the date of this Policy, and the premium will be based upon the age herein stated.

Second.—This Policy may be changed as above, the Ordinary Life Policy to take effect as of the date when the change is made; the premium charged by the Company for the Ordinary Life Policy will be at the Company's present published premium rate for the age of the Insured at his nearest birthday at date of change; on such exchange the term insurance reserve, computed in accordance with the American Table of Mortality and three per cent interest, on the face amount of the insurance exchanged, and any dividends then standing to the credit of this Policy will be applied by the Company toward the payment of premiums upon the Ordinary Life Policy.

MISCELLANEOUS BENEFITS.

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may from time to time change the beneficiary, unless other-

wise provided by indorsement on this Policy or unless there be an existing assignment of this Policy. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change will relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be deducted from the amount payable hereunder.

Interest Allowed at Settlement of Death Claims.—Interest will be allowed on the proceeds of the Policy payable as a death claim from date of receipt of due proof of death at any office of the Company until the date settlement is made at the

Home Office. Interest shall be at the rate declared by the Company on such funds, but at a rate not less than three per cent per annum.

Reinstatement.—This Policy may be reinstated at any time within five years after any default and before expiration of the term period, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company and upon payment of overdue premiums with five per cent interest thereon from their due date.

Residence, Travel and Occupation.—This Policy is free of conditions as to residence, travel, occupation, and military or naval service, except as provided herein under Double Indemnity.

Rights of Insured.—The Insured, during his lifetime, and without the consent of the beneficiary, may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, unless otherwise provided by indorsement hereon. [10]

OPTIONAL METHODS OF SETTLEMENT.

The Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy, in whole or in part, payable under one of the following options. Any such election or any change in election shall not take effect until indorsed on the Policy by the Company at its Home Office. The optional methods of settlement are available when

such proceeds are payable as a death claim provided the instalment or interest payment to any payee is not less than $10.

Option 1.—The proceeds in whole or in part may be left with the Company subject to withdrawal at any time on demand in sums of not less than one hundred dollars. The Company will credit interest annually on the proceeds so left with it at such rate as it may each year declare on such funds, and guarantees that the rate shall be not less than three per cent.

Option 2.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period as may be agreed upon, in accordance with the following table,

Option 3.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period of five, ten or twenty years, as may be agreed upon, and for the remaining lifetime of the payee, in accordance with the following table.

Option 4.—The proceeds in whole or in part may be left with the Company at interest until the death of the payee. The Company will pay interest thereon annually, semi-annually, quarterly or monthly, as may be agreed upon, at such rate as the Company may declare each year on such funds, and guarantees that the interest per one thousand dollars of the proceeds shall be not less than $30 when paid annually, $14.89 when paid semi-annually, $7.42 when paid quarterly, or $2.47 when paid monthly.

Option 5.—The proceeds in whole or in part may be left with the Company at interest and paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the entire proceeds left with the Company, including interest thereon as provided in Option 1, have been paid, provided that the fixed amount payable each year shall be not less than five per cent of the original proceeds left with the Company.

The first instalment under Options 2 and 3 will be payable on the date when the proceeds of the Policy become due, and the instalment payment on each anniversary of the first payment will be increased by such additional interest, in excess of three per cent per annum, as the Company may declare on such funds for that year. The additional interest under Option 2 will be calculated on the unpaid instalments commuted at three per cent per annum, and under Option 3 on the unpaid instalments for the fixed period selected, commuted at three per cent per annum.

When the proceeds of the Policy become payable the Company will deliver to each payee a certificate evidencing the rights and benefits of such payee under the option selected.

At the death of any payee any unpaid sum left with the Company under Options 1, 4 or 5 with accrued interest to date of payment, or the commuted value at three per cent of any unpaid instalments under Option 2, or the commuted value at three per cent of any unpaid instalments for the

fixed period selected under Option 3, will be paid in one sum to the executors or administrators of the payee, unless otherwise agreed in writing.

The Insured may direct in writing that the benefits under the above options shall not be transferable nor subject to commutation or incumbrance during the lifetime of the payee. [11]

OTHER PROVISIONS.

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Payment of Premiums.—All premiums are payable on or before their due date at the Home Office of the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to period of grace herein provided.

Self-Destruction.—In event of self-destruction

during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

The Contract.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity.

REGISTER OF CHANGE OF BENEFICIARY.

NOTE.—No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office

Date of Request	Beneficiary	Indorsed By

9-692-788
9-692-790

NOTE.

This copy should be carefully examined and if any error or omission is found, full particulars, with the number of the policy, should be sent immediately to the Home Office of the Company, No. 346 Broadway, New York City.

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY—Part I.

9-692-791

I, E. Walter Gamer

Residence: Montana, Silver Bow, Butte, W. Silver St. Park & Montana Sts. No. 805 R.F.D.

Place of Business: Gamer's Confectionery

Present Occupation: President and Manager. State exact duties in full: Proprietor duties only. Other occupations (if any): none

Former Residence* | Former place of business* | Former firm or employer*

*No answer required unless change has taken place within past two years.

Born at Helena, Montana, on 23 day of Feb. 1882. Married | Unmarried (Widow not dead) | Color or nationality: White

Send all correspondence to: Residence | Place of Business (Write out full)

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

1. $30000 Ordinary Life Insurance, Annually premium payable. Age nearest birthday 40

2. Plan of Insurance: 7 year Term with additional Benefits: Disability Benefits, 5% Monthly / Double Indemnity Benefit / Disability & Monthly Benefit (Write out benefits not desired). Date Policy to be dated 12/27/16. Name of Beneficiary and Relationship to Insured (Write out full)

3. Settlement to be: (a) Payment of proceeds in one sum; (b) Left to accumulate at interest under policy; (c) Applied to purchase annuity under policy. (Select one)

NOTE.—Option c applies only to Endowment policies containing the Accelerative Endowment option.

4. If insured dies before surrender of policy in event of death, and reserve the right to change the Beneficiary from time to time, I appoint as Beneficiary to receive the proceeds of policy in event of my death, and reserve the right to change the Beneficiary from time to time, the person whose name is set forth in the following clause: My Executor Administrator or Assigns

5. (a) The amount of all the insurance I now have on my life is: $4,000 New York Life, $20,000 Other Companies, $2,000 Fraternal, $ [illegible] Total. (b) Insurance for which I am now applying has been declined by the officers of the New York Life, or any other Company. If so, give particulars: none

6. (a) Insurance on life for the amount which includes benefits in event of total disability is for $ 5,000. (b) Premium has declined to issue insurance on life or for benefits in event of total disability, or has issued insurance on life or benefits in event of total disability for less than the amount applied for. If so, state particulars: none

7. Additional Benefits (For Home Office use only): Also attached to policies of $10000 ea Endowmaity Benefits $1,000 each Disability or Double Indemnity

[boilerplate]

Dated at Butte, Mont. this 16 day of Dec. 1916. Signature of the person applying for Insurance: Ebarter E Gamer

Witnessed by B M Dennis, Agent.

9-692-788

Application to the New York Life Insurance Company—PART II.

9-692-790

ANSWERS TO THE MEDICAL EXAMINER

THIS EXAMINATION MUST BE MADE IN PRIVATE; NO AGENT OR THIRD PERSON BEING PRESENT

1. A. Confectioner
B. Gamer
C. Rancher Syn. 9-692-791
D. No.

2. No.

3. A. None.
B.

4. Montana

5. A. Very frequently. Average 2 drinks
B. Seven. 1 qt. with Meals
C. No.
D. No.

6. A. Yes. Name of such Company or Insurer: No.
B. No.
C. No.
D. No.

7. A. No. If the answer to any query is "Yes" give DETAILS and, if within five years, dates and duration of every illness enabled. Tonsillectomy - Fraternal Insurance Examination
B. No. 1913 - Laid up 3 days. Bad throat. D. Lyons
C. No. Morgan Hosp., Rochester, N.Y.
D. No.
E. No.
F. No. Gain? No. Loss? No. Cause?

8. Have you received a pension or gratuity from any Department of Government? No.
A. The Army or Navy? No.
B. The Land, Naval Forces or Militia? No.
C. The Department of Agriculture, Treasury or Justice? No.
D. The State, Middle Tier or Navy? No.
E. Have you had Examination, Grade in any of above services? No.
F. Have you consulted a physician for any ailment or disease not included in your above answers? No.

9. Name and Address: None. Date: Reason for Consultation, Examination or Treatment:

10. Family Record:

	Age if living	Condition of health, if not good, give cause	Age at death	Cause of Death	How Long Ill
Father	73	Good health	67	Accumulated in Tan	Several
Mother	67				
Brothers 3	46	Good health	42	Suicide	Short
Sisters 2	43	Good health			
	40				

11. A. Is any person in your immediate household now ill with Consumption? (If so, give name and other particulars in full) No.

B. Has any person in your immediate household suffered from or died of that disease within the past year? No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read over and fully understand the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company hereby shall be deemed to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 16 day of Dec 1916

Witnessed by Conrad M.D. Medical Examiner. Signature of the person applying for Insurance: Edward E Gamer

DO NOT USE DASHES OR DITTO MARKS IN ANSWERING QUESTIONS

It is mutually agreed as follows: [illegible] to the application for [illegible] during his lifetime, and only if the applicant

NOTE {This requirement must be complied with in every way, both in the application and in the policy.}

Name GARY No. 2 662 750

NEW YORK LIFE INSURANCE COMPANY

346 & 348 BROADWAY, NEW YORK, N. Y.

The NEW YORK LIFE INSURANCE COMPANY will please accept the following answers in lieu of the answers to the corresponding questions in my application for insurance, dated this 16TH day of DECEMBER 19 26.

QUESTION No. 383	IT IS UNDERSTOOD AND AGREED THAT THE INSURANCE IS WRITTEN WITH DOUBLE INDEMNITY BENEFITS.
QUESTION No.	
QUESTION No.	
QUESTION No.	

and I hereby agree that the above answers shall form a part of my said application for insurance, the agreement in which I hereby renew and confirm, and shall apply to my policy issued thereon.

Dated JANUARY 18, 1927

Witness B M Downie

Edward H Jamieson

Forwarded to the Comptroller's Department from MONTANA Branch Office

JAN 28 1927

And on the 6th day of September, 1933, said defendant duly filed its notice of filing transcript on removal of said cause from the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow to the District Court of the United States for the District of Montana, which said notice is in words and figures following:

NOTICE OF FILING TRANSCRIPT IN THE ABOVE ENTITLED COURT ON REMOVAL OF SAID CAUSE FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW, TO THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA.

To Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased, and to Carl J. Christian, her attorney:

You and each of you are hereby notified that a transcript from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, on removal of the above entitled cause to the District Court of the United States, District of Montana, has been this day filed in the office of the Clerk of the District Court of the United States, District of Montana, at Butte, Montana.

Dated this 6th day of September, 1933.

CHARLES R. LEONARD,
Attorney for Defendant.

Service of the above Notice with copy acknowledged this 6th day of September, 1933.

C. J. CHRISTIAN,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 6, 1933. C. R. Garlow, Clerk. [14]

Thereafter, on the 6th day of September, 1933, defendant duly filed its demurrer herein in words and figures, to-wit:

[Title of Court and Cause—No. 847.]

DEMURRER.

Comes now New York Life Insurance Company, the Defendant in the above entitled action, and demurs to the Complaint on file herein and as ground therefor avers that the said Complaint does not state facts sufficient to constitute a cause of action.

CHARLES R. LEONARD,
Attorney for Defendant.

Service of the above entitled Demurrer with copy acknowledged this 6th day of September, 1933.

C. J. CHRISTIAN,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 6, 1933. C. R. Garlow, Clerk.

Thereafter, on November 1, 1933, court entered an order overruling said demurrer, as follows, towit:

[Title of Court and Cause.]

Counsel for the respective parties present in court, Mr. Carl J. Christian appearing for the plaintiff and Mr. C. R. Leonard for the defendant. Thereupon, on motion of Mr. Christian, court ordered that the name of Mr. William Meyer be entered as associate counsel for the plaintiff.

Thereupon the demurrer to the complaint was by counsel submitted to the court without argument; and thereupon court ordered that said demurrer be overruled, defendant granted 24 hours to answer.

Entered in open Court November 1, 1933.

C. R. GARLOW,
Clerk.

Thereafter, on the 1st day of November, 1933, the answer of the defendant to plaintiff's complaint was duly filed herein in the words and figures following, to-wit: [15]

[Title of Court and Cause.]

ANSWER.

Now comes the Defendant, New York Life Insurance Company, a corporation, and for its answer to the complaint on file herein, admits, denies and alleges as follows, to-wit:

1.

Admits the allegations of Paragraphs 1, 2 and 3 of said Complaint.

2.

Answering the allegations of Paragraph 4 of said Complaint, Defendant denies that Plaintiff, Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased, is the beneficiary named in said policy of insurance, but avers that under the terms of said policy the only designation as beneficiary was to the executors, administrators or assigns of the insured, or to the duly designated beneficiary.

Admits that all premiums which accrued on said policy [16] of insurance to the date of death of said Edward W. Gamer had been paid prior to his death and that there was no default in the payment of premiums on said policy, and that no assignment of said policy is now or was in effect at the time of death of said deceased.

Denies all other allegations of Paragraph 4.

3.

Answering the allegations of Paragraph 5 of said Complaint, defendant admits that said Edward W. Gamer, insured named in said policy of insurance, died at Butte, Montana, on the 10th day of April, 1933.

Admits that the death of said insured did not result from the taking of poison or inhaling gas, or from committing an assault or felony, or from war

or any act incident thereto, or from engaging in riot or insurrection, or from participation as a passenger, or otherwise, in aviation, or aeronautics, or, directly or indirectly, from infirmity of mind or body, or from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury.

Denies that the death of said Edward W. Gamer resulted directly or indirectly from the accidental discharge of a fire-arm, to-wit, a rifle, or any other fire-arm, and denies that any bullet from said alleged rifle, accidently discharged, struck him or caused his death.

Denies all other allegations of Paragraph 5 not herein- [17] before admitted.

4.

Answering the allegations of Paragraph 6 of said Complaint, defendant admits that on or about the 8th day of May, 1933 this plaintiff furnished and delivered to defendant, due proof of the death of said insured. Denies all the other allegations of said Paragraph 6.

5.

Answering the allegations of Paragraph 7 of said Complaint, defendant denies that because of the alleged fact that the death of said Edward W. Gamer resulted from accident, as defined under "Double Indemnity" in said policy of insurance, or for any other cause or at all, Plaintiff is entitled,

under the terms of said policy, to double the face of said policy, to-wit, to the sum of $20,000.00, and denies that the death of said Edward W. Gamer did result from accident, as alleged in said section of said paragraph, or from any accident, and Defendant alleges that by virtue of the death of said Edward W. Gamer, the Plaintiff is entitled, under the provisions of said policy, other than those referring to death resulting from accident as defined under "Double Indemnity" as set forth in said policy, to the sum of Ten Thousand ($10,000.00) Dollars, with interest as hereinafter alleged, and denies that it is indebted in any other or greater amount.

That said Defendant further avers that on the ..... day of June, 1933, and prior to the commencement of this action, [18] upon proof of the death of said Edward W. Gamer, it tendered to the Plaintiff herein, as Executrix of the Estate of Edward W. Gamer, Deceased, the sum of $10,066.96, the same including the face of said policy in the sum of $10,000.00 and the further sum of $66.96, the same being interest on said $10,000.00 from the date of receipt by the Defendant of the proof of death of said Edward W. Gamer until the date of said tender, said interest being at the rate of four and one-quarter per cent per annum, the same being the regular rate declared by the Defendant on such funds, as provided in said policy.

That said tender was refused by the Plaintiff, and the defendant again makes said tender of $10,066.96

and herewith deposits in Court, for plaintiff, the amount so tendered.

6.

Answering the allegations of Paragraph 8 of said Complaint, Defendant denies that there is now due, owing and unpaid from Defendant to Plaintiff on said policy of insurance, the sum of $20,000.00, or any other sum or amount except the sum of $10,-966.96 as hereinabove alleged and for which tender is made as hereinbefore set forth.

7.

Defendant denies all allegations in said Complaint not hereinbefore admitted or denied.

FURTHER ANSWERING SAID COMPLAINT OF THE PLAINTIFF HEREIN AND AS AN AFFIRMATIVE DEFENSE THERETO, DEFENDANT ALLEGES:

That this defendant herein and the said Walter E. Gamer [19] entered into the agreement constituting the policy of insurance mentioned and set forth in said Complaint, and that said policy amongst other conditions herein, contains the following:

"The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury and within the term period.

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger, or otherwise, in aviation or aeronautics; or, directly or indirectly, from infirmity of mind or body; from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury."

AND DEFENDANT ALLEGES that the death of said E. Walter Gamer, also known as Edward W. Gamer, resulted from self-destruction by means of intentionally discharging into his own body a certain bullet from a certain loaded rifle held in the hand or hands of himself with intention to take his own life and on the 10th day of April, 1933 the said Edward W. Gamer did take his own life. [20]

WHEREFORE, Defendant, having fully answered, asks judgment for its costs herein expended.

CHARLES R. LEONARD,
W. D. KYLE,
KREMER, SANDERS & KREMER
Attorneys for Defendant.

State of Montana,
County of Silver Bow—ss.

CHARLES R. LEONARD, being first duly sworn, says: That he is the attorney for the NEW YORK LIFE INSURANCE COMPANY, a Corporation, the Defendant in the within and foregoing action, and makes this verification for the reason that there is no officer of said Defendant Company within Silver Bow County, Montana, wherein affiant resides, and that the foregoing Answer is true to the best knowledge, information and belief of Affiant.

CHARLES R. LEONARD

Subscribed and sworn to before me this 1st day of November, 1933.

H. A. TYVAND

Notary Public for the State of Montana, residing at Butte, Mont. My commission expires June 21st, 1934.

Service of this Answer admitted Nov. 1, 1933.

WM. MEYER
C. J. CHRISTIAN
Attys. for Plaintiff.

[Endorsed]: Filed Nov. 1, 1933. C. R. Garlow, Clerk. [21]

Thereafter on the 1st day of November, 1933, the reply of the plaintiff to the answer of defendant was duly filed herein in words and figures as follows, to-wit:

[Title of Court and Cause.] [22]

REPLY.

Comes now the above named plaintiff and for her reply to the answer of the defendant, on file herein, admits, denies and alleges:

1.

Replying to the allegations contained in paragraph five thereof plaintiff admits that on the ..... day of June, 1933, defendant offered to pay to plaintiff herein as executrix of the estate of Edward W. Gamer, deceased, the sum of $10,066.96, but denies that any legal or other sufficient tender was, on said date, or at any other time, or at all, made to plaintiff. Further replying to the allegations contained in said paragraph five, plaintiff admits that said offer so made was by her refused.

And comes now the above named plaintiff and replying to the affirmative defense as set forth in the answer of defendant, on file herein, admits, denies and alleges:

1.

Admits that defendant and Walter E. Gamer, also known as E. Walter Gamer, entered into the agreement constituting the policy of insurance mentioned and set forth in plaintiff's complaint on file

herein, and that said policy contained, amongst other conditions, the provisions set forth in said affirmative defense. Further replying to the allegations contained in said affirmative defense plaintiff denies that the death of the said E. Walter Gamer resulted from self-destruction or that he intentionally discharged into his own body a certain, or any, bullet from a certain or any [23] loaded rifle held in the hand or hands of the said E. Walter Gamer with the intention to take his own life, and plaintiff specifically denies that on the 10th day of April, 1933, the said E. Walter Gamer took his own life, and in this connection alleges: That the death of the said E. Walter Gamer occurred on the 10th day of April, 1933, and resulted directly from the accidental discharge of a firearm, to wit: a rifle, the bullet from said rifle so accidentally discharged striking the said E. Walter Gamer and causing his said death.

2.

Denies each and every allegation in said answer contained not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, plaintiff, having fully replied to the answer of defendant on file herein, repeats her prayer as in her complaint hereinbefore set forth.

CARL J. CHRISTIAN
WILLIAM MEYER
Attorneys for Plaintiff. [24]

United States of America
State of Montana
County of Silver Bow—ss.

Stella Jane Gamer being first duly sworn upon her oath deposes and says: That she is the executrix of the Will of E. Walter Gamer, deceased, and as such executrix is the plaintiff named in the within and foregoing Reply; that she has read said Reply and knows the contents thereof and the same is true of her own knowledge, except as to matters therein stated on information and belief, and as to such matters she believes it to be true.

STELLA J. GAMER

Subscribed and sworn to before me this 1st day of November, A. D. 1933.

WILLIAM MEYER

Notary Public for the State of Mont., Residing at Butte, Montana. My Com. expires April 24, 1936.

Service of the within and foregoing Reply by copy admitted November 1st, 1933.

W. D. KYLE
CHARLES R. LEONARD
KREMER, SANDERS & KREMER
Attorneys for Defendant.

[Endorsed]: Filed Nov. 1, 1933. C. R. Garlow, Clerk. [25]

Thereafter, on November 14, 1935, the VERDICT OF THE JURY as rendered was duly filed herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant for the sum of $20,000.00, with interest thereon from the 8th day of May, A. D. 1933, at the rate of 6% per annum.

TROY EVANS,
Foreman.

[Endorsed]: Filed Nov. 14, 1935. C. R. Garlow, Clerk.

That thereafter on the 18th day of November, 1935, judgment was duly filed and entered upon said verdict in said cause in the words and figures following, to-wit: [26]

[Title of Court and Cause.]

JUDGMENT.

The above entitled action coming on regularly for hearing on the 11th day of November, 1935, and being continued thereafter on the 12th, 13th and 14th days of November, 1935, plaintiff being present in person and represented by her attorneys, Messrs. Carl J. Christian and William Meyer, and defend-

ant being represented by its attorneys, C. R. Leonard, Esq., W. D. Kyle, Esq., and J. A. Poore, Esq., and both sides having announced that they were ready for trial, a jury was thereupon duly and regularly empaneled and sworn to try said cause and thereafter testimony was introduced upon behalf of plaintiff, and being concluded, testimony was thereupon introduced upon behalf of defendant, and being concluded and both sides having announced in Open Court that the testimony was concluded, the cause was thereupon argued to the Court and Jury by respective counsel, and upon completion of said arguments the jury was duly instructed by the Court as to the law of the case and thereafter retired to deliberate upon their verdict, and thereafter did return its said verdict into open court, which said verdict is in words and figures following, to-wit:

[Title of Court and Cause.]

No. 847.

We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant for the sum of $20,000.00, with interest thereon from the 8th day of May, A. D., 1933, at the rate of 6% per annum.

TROY EVANS,
Foreman.

NOW, THEREFORE, upon consideration by the Court of the premises and the law, it is hereby Ordered, Adjudged and Decreed that plaintiff do

have and recover judgment against the defendant for the sum of $20,000.00 together with interest thereon at the rate of six (6%) per cent per annum from the 8th day of May, [27] 1933, together with her costs and disbursements incurred in said action and amounting to and hereby taxed in the sum of $183.55.

Entered this 18th day of November, A. D. 1935.

C. R. GARLOW, Clerk

By HAROLD L. ALLEN, Deputy.

[Endorsed]: Entered November 18, 1935. C. R. Garlow, Clerk. [28]

Thereafter, on January 31, 1936, Defendant's Bill of Exceptions was settled, allowed and filed herein, in the words and figures following, to-wit:

[Title of Court and Cause.] [29]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That the above entitled cause came on regularly for trial in the above entitled court before the Honorable James H. Baldwin, Judge, sitting with a jury, on Monday, November 11, 1935, at 2:00 o'clock p. m., Messrs. Carl J. Christian and William Meyer, appearing as attorneys for the plaintiff; and Messrs. Charles R. Leonard, W. D. Kyle and J. A. Poore, appearing as attorneys for the defendant.

Thereupon the following proceedings were had, orders made, objections interposed, rulings made by the court, and exceptions taken; and the proceed-

ings, orders and exceptions hereinafter appearing, had and taken thereon, and the evidence and testimony hereinafter set out, being all the evidence and testimony offered and introduced and offered and rejected. The testimony and evidence hereinafter set out was and is all the testimony and [30] evidence heard by the court, and was and is all the testimony and evidence offered by the parties to this cause and received by the court, and offered by the parties to this cause and rejected by the court, to-wit: [31]

The COURT: Is there any dispute as to where the burden of proof in this case is?

Mr. POORE: We have our view, it is on the plaintiff throughout the trial.

Mr. MEYER: We have our view, it is on the defendant as soon as the plaintiff has proved the death of Mr. Gamer resulted from violent and external means. The law presumes it was accidental.

Mr. POORE: We dispute that as a matter of law and we would be glad to furnish Your Honor authority to support our position.

The COURT: Very well.

MALCOLM GILLIS,

called as a witness on behalf of plaintiff, being duly sworn testified as follows:

Direct Examination by Mr. Christian.

The WITNESS: My name is Malcolm Gillis; I reside at 823 West Quartz, in Butte, and have re-

(Testimony of Malcolm Gillis.)

sided in Butte, since 1889. I was acquainted with Walter Gamer in his lifetime. I am in the coal and wood business. I think I had known Walter Gamer in the neighborhood of 25 years. I first met him in Helena and then knew him later on in Butte. I had known him all the time he lived in Butte. It was casual acquaintance, there was no business relations or anything of that kind. I thought I knew him very well and saw him quite frequently; saw him, I presume for 5, or 6 times a week, practically every day. I think Mr. Gamer was a man about my size, and I am about 5 foot 10 inches. His weight was about 170 or 175 pounds, some such matter. [32] By reason of my acquaintance with Mr. Gamer I would say I was well enough acquainted with him to be a judge of his disposition and demeanor. He had a jovial disposition, very congenial. He was a person who was inclined to be cheerful. I can't say I ever found him morose. He was a person who enjoyed life.

I last saw Mr. Gamer, prior to his death, on Friday night; I don't recall the day of the month. I couldn't tell you the day he died but think it was Monday or Tuesday,—in the morning, I think Monday. I had seen him on the previous Friday. At that time his disposition was as usual, congenial and companionable. I did not notice any change in his disposition from what it had been on previous occasions. He was given to joking with his friends and kidding them continuously. On the

(Testimony of Malcolm Gillis.)

evening of Friday when I last saw him I did not notice any change in his disposition from what it had been for years previous. He did not at that time appear to be despondent or discouraged; nothing in his attitude to indicate anything of that kind.

I have seen Mr. Gamer in company with his wife and daughter, and I was casually acquainted with Mrs. Gamer and her daughter. Mr. Gamer seemed absolutely devoted to his daughter. Their family life appeared to be happy as far as I could observe. Mrs. Gamer and the little daughter appeared fond of their father and husband as far as I could observe.

In my acquaintanceship with Mr. Gamer I observed his health and I thought I knew about what his condition was. The state of his health was the very best. I never heard him make any complaint about illness or ill health. I did not notice any change in his physical appearance in recent months, prior to his death. I had gone fishing with Mr. Gamer quite frequently during the season, the fishing season; might go once or twice a week and [33] might go every ten days, just as Mr. Gamer's convenience would let him go. On these trips he was able to travel along and hold up his end physically with the rest. He was a strong person physically.

I had occasion to go to the Gamer home on Monday morning April 10, 1933, and I would think I arrived there somewhere around half past

(Testimony of Malcolm Gillis.)

eleven, between that and twelve o'clock, some where along in there. When I reached the place Mrs. Gamer was there, as was her daughter and Miss Christian, and another lady whose name I don't recall, an elderly woman. There was also a doctor there from the Murray Hospital and I think it was Dr. McHaffey. I did not stop to knock when I entered the house, but walked in and went upstairs after entering the house. I there found the remains of Mr. Gamer lying on the floor. The body was lying east and west, his head toward the west; his feet, or legs, up to the knees in the closet; the balance of the body in his bedroom. The body was clothed and it was clothing that a man would wear out fishing or around the house doing chores and looking after his personal affairs around the house. He had on shoes of the rough order, what we would call a common shoe, rough trousers and undershirt, a fishing jacket or hunting jacket and a hat on the back of his head. He was lying down and his head was in his hat and his hat was on his head about to here, well above the forehead. I had seen the clothing Mr. Gamer was clothed in on previous occasions, either that or similar clothing; had seen them when I was out fishing with him. I was acquainted with these clothes; they looked familiar to me. I had seen him wear them before on fishing trips, or simi ar clothes.

I saw a firearm there and it was a rifle. I had seen that gun before; had seen it when we would go fishing when he invariably [34] had that gun with

(Testimony of Malcolm Gillis.)

him. When I saw the gun this morning when I went to the Gamer home it was lying parallel with the body with the muzzle pointing to the west. Mr. Gamer did not have a hold of the gun; the gun was laying outside of his hand; his hand was next to his body and the gun next to his hand. I saw a cigar stub in that house; there was a cigar stub on the window sill, laying on the window sill. It was not placed so that the lit end would extend over the window sill; it just seemed to be on the window. I saw an upper plate of teeth and they were in the clothes closet on the floor. I think they were about 12 inches or about 16 or 18 inches from the door of the closet, somewhere in there, I wouldn't be positive.

The window sill on which the cigar stub was laying was on the south side of the house but I wouldn't be sure that it was in the clothes closet or in the bedroom. The clothes closet was a very narrow closet, about the width of the door and the door was on the small order. The closet was from 6 to 8 feet deep or some such matter. There were shelves in the closet on either side and in the rear end of the closet. There was clothing hanging in the closet, on both sides of the closet and in the end wall. The closet was quite full of clothing, quite a lot of clothing in there. It would hardly be possible to get in the closet without brushing against the clothing.

(Testimony of Malcolm Gillis.)

I observed a pole hanging in the closet in the rear end, and it went north and south, crossways. The purpose of that was to hang clothes on with a coat hanger. There was clothing hanging there but I didn't notice particularly the specific garments,—men's clothing, suits and overcoats. As I recollect there was a window in this closet on the right hand side. I would not be positive that that was the window upon which the cigar was laying but am rather of the opinion that is where the cigar was. [35]

I saw hunting and fishing appliances in the closet and it consisted of a fishing rod case in the east end of the closet and there was a gun case there and that was a shot gun case, a short case, what they call a knockdown case, I presume. I would not think this rifle owned by Mr. Gamer, which I was familiar with, could be taken down. I am not familiar with rifles, but I wouldn't think so. Mr. Gamer had a shot gun and I had seen that. It could be taken apart. I took it for granted that the case belonged to the shot gun. I can't say that I ever saw a case for the rifle.

I don't know that I ever went fishing with Mr. Gamer that he didn't have a gun with him. I had seen him take this particular rifle of which we are speaking along. I would observe this gun that was taken along by seeing it lying down in the car.

(Testimony of Malcolm Gillis.)

I had never been in Mr. Gamer's home prior to the morning of the 10th of April, 1933. I didn't make any specific observation of the room and closet and rest of the house when there, although I noticed the surroundings in the house. I did not find any note or message from Mr. Gamer. I saw the rifle laying on the floor but did not observe any blood on it. I felt well acquainted with Mr. Gamer and talked with him quite frequently. I never heard him complain of any lack of finances or having financial trouble. He always seemed to have money. When he went on fishing trips he was able to pay his share and sometimes paid mine.

Cross Examination by Mr. Poore.

Q. Mr. Gillis what was the occasion of you going to the Gamer home on the morning of the 10th of April, 1933?

A. I had an appointment with Mr. Gamer that day at 11:30. [36]

The WITNESS: I had an appointment with him at 11:30 that day; I was to meet him at the Gamer Shoe Store in Butte, Montana, and I had made the appointment Friday night previous. If his death occurred on the 10th of April, Monday, then I made the appointment on the evening of the 7th of April, Friday evening; I would not be sure as to the date but it was Friday, preceding his death. By that appointment he was to meet me at the Gamer Shoe Store at 11:30 o'clock Monday morning. That was

(Testimony of Malcolm Gillis.)

a business engagement.

Q. How did you happen to go to the home?

A. Well I was to meet a party at the airport and the plane was late coming in and I couldn't keep the engagement with Mr. Gamer and meet this party that was coming into Butte, so I called up the Gamer house to inform Mr. Gamer of the fact I couldn't meet him at 11:30.

When I called up the home his daughter responded to the telephone. Later on from that conversation I gained the information that there was some trouble at the Gamer home; learned it from Mrs. Gamer; by reason of her telephone conversation to me I believed something had happened at the Gamer home and I then hurriedly entered the Gamer home. Mr. Parker went with me and he went into the Gamer home. I don't know where he is now but I think he is down in Oregon. His name is Sam R. Parker.

When I arrived at the Gamer home Dr. McHaffey was present and also Mrs. Gamer and her daughter and another lady that lived across the street, an elderly woman. When I arrived at the home I walked in without knocking because of the telephone conversation I had had; I rapped on the door and immediately walked in; I didn't wait for anybody to open the door. Prior to that time I had never been in the Gamer home and had never visited with Mr. and Mrs. Gamer at their home. When I went into the home I did not [37] immedi-

(Testimony of Malcolm Gillis.)

ately go upstairs; went upstairs maybe 5 or 10 minutes after I was in the house. I think possibly Dr. McHaffey went upstairs before I did; I don't know. The Coroner arrived after I was there. I telephoned for the Coroner. When I went upstairs I think I went with the Coroner. Dr. McHaffey was not upstairs when I got there; he was standing downstairs. I could not say whether the Doctor went up with us or not.

When I arrived upstairs I went into the bedroom off the stairway. Leading into that bedroom off the stairway and to the east of the bedroom is the clothes closet. That is the clothes closet which I referred to. That is a narrow clothes closet.

Q. And the ceiling extends to the ceiling of the bedroom?

A. Well of course there was a partition between the closet and bedroom; I imagine they were about the same height.

The clothes closet is quite a long closet. Mr. Gamer was lying on his back with his feet in the closet up to about the knees. The balance of the body was in the bedroom. The rifle was laying on the left hand side. He did not have a hold of the rifle. He was dressed in clothes, rough clothes that he would wear about the home. I did not examine the face for bullet wounds or anything of that kind, just casual observation. I was somewhat shaky and excited. I saw his cigar stub on the window sill. I am rather of the opinion that the window

(Testimony of Malcolm Gillis.)

sill was in the closet. If, on the former trial of this case, I said "I noticed a cigar stub around there; it was on the window sill in the closet" I presume my recollection would likely be clearer then than it is now. It is my judgment that the cigar stub was on the window sill in the clothes closet, but it might be in the bedroom. I would rather think that my testimony in the former hearing would be correct. [38]

My opinion is that the window sill was the lower end of the narrow window in the clothes closet on the south side of the clothes closet and right up beside the door of the clothes closet. In the southeast corner of the clothes closet I saw a fishing case. I did not have to disturb the clothes to see that; I could just incidentally see it. I could look directly in the closet and see that without interference with the clothes; you could see part of it, the top part was standing up with the clothes hanging down. The clothes I saw in the closet were clothes hanging on the north wall of the closet and clothes were hanging on south wall on hooks; clothes were hanging on the hooks and hanging down loose. On the north side of that wall it is my recollection that clothes were hanging down loosely in the closet.

There was a pole across the east end of the closet and it extended north and south over the east end of the closet. Clothes were hanging on that. I don't know just how they were hanging on it anymore than they were hanging there. It is my opinion

(Testimony of Malcolm Gillis.)

they were hanging on hangers. I also saw shoes in the closet on shelves and they were sitting on shelves. The shelves were along parallel with the width of the building east and west and I think on the north side which would be the left hand side as you go in the closet. I don't recall seeing shoes on the right hand side. I wouldn't be sure whether there was a shelf on the right hand side or not. I also saw a gun case in the closet. I just took it for granted it was a gun case, a leather case. I think the case would be about that long, 2 or 2½ feet somewhere along in there, but I wouldn't be sure. I think about 2½ feet would be the length of this gun case. As I recall that gun case was in the north side of the closet standing up, on the left hand side, with the large end down and it was far in. You could see it readily without [39] interference from the clothes; you could see part of it, the chances are some clothes were long and others short, but they were all hanging from these hangers or hooks. There wasn't anything on the floor to disturb my vision that I recall; I think there was a little case a fellow has when he goes fishing for equipment, but I wouldn't be positive on that. I did not see this gun case taken out of the closet at any time. I could see it well enough to determine its length about 2½ feet long. I couldn't say as to whether or not that is the case which contained the rifle, but I wouldn't think so, this was a gun

(Testimony of Malcolm Gillis.)

case that I have reference to; I mean a shot gun case.

Q. What reason would you assign in telling me it was not the case that contained the rifle?

A. Well I never seen a rifle case with Mr. Gamer.

I never saw him have a rifle case.

Q. Have you seen the gun, that is the rifle since the time that you saw it on Mr. Gamer's body, when you saw it lying on the floor?

A. I think I saw it at the last trial.

At that time I was not asked to identify it as the same rifle, but I recognized it as the rifle. I took it for granted it was the same rifle as the rifle I had seen on Mr. Gamer's body in the bedroom or closet. I don't know what caliber rifle it was; I don't know what make it was. I never saw it in a case.

Q. Do you know whether or not he ever had that rifle fishing?

A. Well as far as I know it was that rifle or a similar rifle.

I wouldn't know whether it would be a high power rifle that he took fishing or not. I never had a gun in my life., I would know the difference between a rifle and a shot gun. I wouldn't say that I would know a take down rifle if I saw it. I think I [40] would know a takedown shot gun if I saw it. I don't know that I could take it down but I have seen them take them down. I can't say

(Testimony of Malcolm Gillis.)

that I have seen them take down rifles. I don't know that I have seen him take a shot gun on a fishing trip. I know he had a gun sometimes on a a fishing trip. I wouldn't be sure whether some times he did not or not; I don't recall an incident where he didn't take a gun along. I couldn't tell you the exact date when I last went fishing with him, but off and on practically every weekend during the fishing season. I was fishing with him the previous Spring but I think not since the previous Spring. As a matter of fact I go fishing when fishing is pleasant, that is in the months of May, June, July, August and possibly some in September, but I don't fish when the ice is on the stream. In the month of April it is more or less on the stream. On the Madison as a rule, in the month of April, ice is flowing on the stream, and quite frequently in many places the stream is covered with ice and it is not pleasant to fish and I don't go. I have been out fishing on the Madison when there was snow and ice.

Q. Your fishing season is in the months of June, July and August?

Mr. MEYER: That is objected to as immaterial and improper cross-examination and not within the issues of this case.

The COURT: I think it is repetition. He has answered.

The WITNESS: I arrived at the home between 11:30 and 12:00 o'clock; I couldn't tell you just

(Testimony of Malcolm Gillis.)

within a few minutes. The body was lying on its back, facing west, the head was toward the west and the feet were towards the east, the feet extending into the clothes closet as I have described it and the gun was lying parallel with the body on the floor. The stock or butt of the gun was not between his legs but was on the floor to his side. [41] No part of the gun was lying on the body. That is my recollection and I am quite sure that is the position of the gun. I think the hat was visible on his head without moving the body. I saw a set of false teeth in the closet. I saw them in the closet before they were picked up. I don't know who picked them up. I did not see the glasses there. I was there when the undertakers took the body out. I did not make any examination of the body at all and I would not be able to testify to any fact concerning wounds on the body. All I saw was the wound in the back of the head where the blood came, the bullet came out.

These clothes Mr. Gamer had on would be clothes he would ordinarily wear around the home if he was going to do any chores; that is the kind I would expect to see him wearing. There was nothing about the clothes which indicated that he had gone fishing or was going fishing. He had the same kind of clothing on that he ordinarily would wear fishing.

I noticed the bullet hole in the ceiling of the clothes closet. That was a plastered ceiling. The

(Testimony of Malcolm Gillis.)

bullet hole with reference to the door of the clothes closet was just inside of the closet and it would be about in the center of the north and south side of the closet over the door and in the plaster ceiling of the clothes closet. I saw blood or flesh around that bullet hole and that was spattered over the ceiling of the clothes closet. That bullet hole was sort of an oblong hole; it was larger at one side than the other; it was irregular in the ceiling. In my best judgment it might be 8 or 10 or 12 inches or some such matter in from the door of the clothes closet.

If part of my testimony at the last trial was "I know he had a rough pair of shoes on; he had clothes a man would wear in doing chores about the house, judging him by myself he would wear [42] the same clothes doing the chores about the house he would wear on a fishing trip. I didn't at that time think he was dressed as a fisherman; it never occurred to my mind on the 10th, I didn't form the opinion then he was going hunting or was dressed to go fishing" that is my recollection now. That is what I want to be understood now the same as I did before.

Re-Direct Examination by Mr. Christian.

The WITNESS: In my testimony given at the former trial of this case I testified as follows: "I had seen this particular clothing before, had seen the trousers and the jacket when we were out fishing," and that is my best recollection today. I also

(Testimony of Malcolm Gillis.)

testified further "It was the outfit that I had seen him wear when I had been fishing with him and I think I knew the clothes from general observation." To the best of my recollection my recollection at that time was correct.

Q. You referred to the hole in the closet on the ceiling and said it was oblong. Was it longer east and west or north and south?

A. The break in the plaster was longer north and south than it was from east and west.

I stated in answer to a question of Mr. Poore that I had a business engagement with Mr. Gamer. It wasn't a business engagement; it was business principally of Mr. Gamer and myself of a social nature; it was not what is ordinarily termed business.

Re-Cross Examination by Mr. Poore.

The WITNESS: It was an engagement which he had previously [43] agreed with me to meet and it was such an engagement that I felt it necessary to call him at his home that I would not be able to meet him and to try and fix a date in the afternoon when I would be able to meet him, which I did, 1:30. We had fixed it at 11:30 and I wanted to change it to 1:30. That engagement was such that I expected to meet it. Mr. Walter Gamer had not been in the habit of breaking engagements with me to my knowledge. When he made an engagement he tried to keep it. That engagement had nothing to do with going fishing or hunting. It

(Testimony of Malcolm Gillis.)

was an engagement concerning a matter which he and I were working on, private affairs of our own.

Re-Direct Examination by Mr. Christian.

The WITNESS: It was not an important engagement; it was a fraternal question that we had between ourselves and it could well have been postponed to any time.

Re-Cross Examination by Mr. Poore.

The WITNESS: Notwithstanding I felt duty bound to call his home when I could not meet the date.

Witness excused. [44]

Mr. MEYER: If the court please at the last trial of this case

E. V. HANLEY

was a witness on the part of the plaintiff. He has since died and we now offer in evidence the testimony of Mr. Hanley as given at the last trial. I have a transcript of the testimony prepared by the reporter and it is agreed that this is the testimony which he gave at the last trial.

Mr. POORE: No objection.

The COURT: Proceed to read it.

Mr. MEYER: (Reading) E. V. Hanley, called as a witness on behalf of the plaintiff, having been first duly sworn testified as follows:

(Testimony of E. V. Hanley.)

Direct Examination by Mr. Meyer.

The WITNESS: My name is E. V. Hanley. I am a mortician and have been engaged in that business 22 years. I am duly licensed in the state of Montana. On the 10th day of last April, I was employed at the White Funeral Home in this city. I knew Walter Gamer in his lifetime and saw his body on the 10th day of April of this year in his home, upstairs. The number of that home was 805 West Silver, in this city. At that time Mr. Gamer was dead. I subsequently examined the body.

The cause of death was shock and hemorrhage caused by gun shot wound. At the home of Mr. Gamer when I first saw the body I saw a gun or rifle there in the possession of the Coroner. I didn't see an upper plate of false teeth at the Gamer home. It was handed to me by another party. I know about where it was before it was handed to me. Dr. McHaffey picked it up; it was close to the entrance, or inside the entrance of the closet; just the spot I don't know. I mean close to the entrance of the closet and either inside the closet or at the outside, but he stooped in that [45] direction to pick it up.

I saw Mr. Gamer's glasses in the possession of a man's hands after we removed the remains to the cot; that was at the house. I don't know where they were before they were picked up, but they were broken. That was the 10th day of April.

(Testimony of E. V. Hanley.)

Cross Examination by Mr. Sanders.

The WITNESS: I was at the home of Mr. Gamer a little after 12:00 o'clock. Mr. Jordan accompanied me. He is assistant to me of White Mortuary. When I arrived at the residence I went upstairs and we went in from the front room, we went up the stairway and when we got to the top of the stairway we went south to the bedroom on the second floor. Off the bedroom there was a closet. (Sketch admitted in evidence as Exhibit 1). Referring to the sketch, this is the bedroom. We came in through this room. This is the south bedroom, comes south, and the closet goes off from this bedroom, going upstairs that way; that is the bedroom is west and the closet east. This depicts the closet. When I saw the body it was about here. His feet were right at the edge of the door between the bedroom and the closet and his body was lying into the bedroom; a portion of his legs, from the ankle were into the closet and the rest of his body out in the bedroom. He was lying flat on his back.

The Coroner had this rifle that I mentioned in his hands. I don't know where it had been prior to the time I saw it in the Coroner's hands only from what I heard. I did not examine the interior of the closet. After we lifted the remains onto the cot the glasses, the eye glasses of Mr. Gamer, were picked up, whether they were under him I am not

(Testimony of E. V. Hanley.)

certain, but they were broken in the center. I couldn't say who picked them up. I did not. This [46] upper plate of false teeth that I referred to, Dr. McHaffey picked up also after we lifted the body, and he asked if we wanted his teeth and I said yes. He handed them to Mr. White and Mr. White handed them to me. Mr. White is the proprietor of the establishment where I was working.

Q. You don't know where the teeth were originally found?

A. They were picked—he was standing about here and as he stooped, he stooped south and I know they were either there, or there; just the spot there I don't know.

Dr. McHaffey had been at the residence of Mr. Gamer prior to my arrival. I took the upper plate away with me. There was no lower plate of false teeth but there was bridge work. His lower teeth were his normal teeth, his own teeth; he had I would say about six and it was bridge work from there back on each side of the six in the lower jaw; and these six natural teeth were in the center of his lower jaw. I couldn't say how many false teeth on each side of the six natural teeth; approximately four or five anyway. These two sides of artificial teeth on each side of the natural teeth were braced on to the lower teeth on each side and then braced across behind his own teeth. That brace is a form of reinforcement of wire or maybe silver, whatever the reinforcement was. At the time I saw the body

(Testimony of E. V. Hanley.)

of Mr. Gamer the edge of this lower plate that I just described was sticking just even with his mouth, out, with the teeth turned over, outward. The upper plate that I have mentioned was in no way fractured or cracked. The false teeth in the upper plate was all intact in no way damaged. The deceased legs were extended. I could not say how far apart his feet were at the heels. At the time I first saw him his hands were at his side when I got there because the Coroner was there before I was, Mr. White was there before I [47] was and there were other people there before I was there. I couldn't say where his right arm was resting, only to the side of his body; his left arm was to the side, both laying on the floor. I don't know exactly whether they were just straight but they were at his side. Neither of his hands rested upon the upper portion of his chest or body when I was there. His left hand was not covered with blood at that time.

I did not examine his rifle at that time. I never had the rifle in my possession. The Coroner had it at that time in his hands. I did not examine the walls of the bedroom for the purpose of discovering holes, bullet holes, or the ceiling of the bedroom. I did not examine the wall or ceiling of the closet with a view of discovering bullet holes. I couldn't say whether the ceiling of the closet was a plastered ceiling or not. It appeared to be papered but I am not sure. I did not see a round hole, about the size of a quarter, in the ceiling of the clothes closet, but I was there when some one spoke of it and

(Testimony of E. V. Hanley.)

they looked at it, but myself, personally didn't look. I did not discover any holes in the walls of the closet, nor in the east end. I could not say there was a window in the south wall of the closet, but there was a light in there, whether artificial or natural light I am not certain. I did not see and no one pointed out to me a cigar butt. I did not look at the window sill.

Q. What was the condition of the glasses, were they broken?

A. They were broken under the center, it appeared to me. This man was holding them in his hand. They were the type of glass that went over his ear with celluloid around the glasses. It appeared that the brace upon the nose piece was broken there. I couldn't say whether the lens were broken or not. [48]

Q. Describe the condition of the inside of the clothes room with reference to blood stains?

A. Well I didn't notice any blood stains myself, but when these men spoke they were looking to the ceiling and it appeared there was some spots there, but what type of spots I couldn't say.

I did not look at the ceiling at all.

Q. With reference to these spots that you just mentioned is what you heard?

A. Well I heard—well I saw some spots when I was going by there but I never examined them myself.

Those spots to me looked like they were white

(Testimony of E. V. Hanley.)

and red; it appeared like blood. There were no other objects in the vicinity of where I saw these red spots that looked like blood that I know of. There was no appearance of skin, shreds of skin that I noticed. I didn't notice the sides of the walls in the closet splashed with blood.

I examined the face of the deceased at the White Funeral Home. I looked at it at the residence but didn't examine it; made no examination. At the home I noticed the lower plate of teeth turned over and protruding outward. Aside from that and the fact I saw the upper plate I made no other examination of the body at the home while it was on the floor. I did not examine the back of his head there. Right under the head of the deceased as he was lying upon the floor, and to the side was saturated with blood clots. When we removed him to the cot I lifted the head. I observed the back of his head in removing his body to this cot. The back of his head was badly shattered.

Q. Blown out, blown away?

A. The biggest part of it was to the back. [49]

That portion of the back of his head was badly shattered or blown out was from here to there, about the joint of the parietal bone of the skull, a diameter of about that size, about 3½ inches. I did not notice at the house whether there were any additional fractures of the skull. At the house, there was brain tissue escaping when we lifted him from the cot and the technical name of that portion of the human brain that I saw was the occipital.

(Testimony of E. V. Hanley.)

Q. Was that scattered on the floor?

A. Well it was brain,—what you call brain tissue.

Mr. Jordan placed the body upon this cot and afterwards we removed it to White's Funeral Home at 307 West Park. Mr. Jordon was assisting me. He is an undertaker. Upon arrival at the undertaking parlors on West Park Street we undressed the remains and washed off the blood stains that were on the face and on the hands and prepared the wounds and also prepared him for burial and preservation.

At the undertaking establishment I examined the face of the deceased for the purpose of discovering lacerations or abrasions or bullet holes. Upon the face of the deceased I discovered a laceration on the upper left side of the lip, right about there, maybe 1/8 or 2/8 of an inch or so, about that as I estimate, from the left corner of the mouth; about 1/8 or 1/4 of an inch from the left corner of the deceased's mouth. It extended upward on the lip, the upper lip. This laceration was about 1/2 inch long. I observed the deceased's mouth when I first saw him. The jaw was not dropped down, it was more or less partly open, but the edge of these teeth showed. I made just an observation examination at the house.

Q. Returning to the undertaking establishment and the [50] laceration on the upper lip, what was the character of that laceration?

A. It ran up to about half an inch, maybe an eighth or two-eighths or a quarter up; it was not

(Testimony of E. V. Hanley.)

made,—smooth incision or anything—it was smooth enough that when I stitched it, it came together.

I am familiar with a surgeon's knife. It didn't appear to be cut with that knife. The edges were a little ragged. In preparing the body at the undertaker's establishment I stitched up this laceration that I have mentioned. I don't know how many stitches I put in it, but just off hand I would say three or maybe four. It was not necessary to pull the edges of the skin together. The skin on the upper lip at this point of laceration came together normally. There was no missing skin on the end of the portion of this laceration on the outer portion of the lip. There was no evidence of a bullet wound through any portion of this laceration to my knowledge. I examined the laceration.

Q. In preparing this, or treating this laceration, whatever you term it, did you look inside the upper lip of the deceased?

A. When I placed his teeth back, his upper plate, that is the only occasion I had.

The upper plate that I have already mentioned was in no way fractured or injured. It fit back upon the gums normally. There was no laceration on the inside of the upper lip that I noticed outside of this one here that I spoke of.

Q. I am speaking about the one you already testified as having stitched on the inside of that laceration was there any laceration?

A. That laceration would be termed more or

(Testimony of E. V. Hanley.)

less a split lip; the outside tissue was split and the inside tissue was split, but the center of it was held together by a muscle fiber, held both sides together.

[51]

The outer skin, the upper of this laceration which I have testified to and which I sewed together, and the skin came together normally fitting. On the inside there was a laceration opposite the outer laceration; this same lip, as I said before, it was split, practically what you would call a complete split, but not that you could take it apart because it was held by a muscle fiber, the one on the outside and back of it was the same.

Q. Then as I understand it there was an outer laceration you testified to and an inner laceration, but the entire lip was not cut through?

A. No sir.

The inner portion of the lip was held together by muscle fiber.

I examined the upper gum. The upper gum was not lacerated. There was no evidence of a bullet wound or hole through the upper gum. When I restored the upper plate against the upper gum it fitted normally against the upper gum.

Q. What was the edges' position after having been lifted against the upper gum with respect to normal position on the inner side of the upper lip? Do you get me?

A. Not quite.

(Testimony of E. V. Hanley.)

Q. After you re-fitted the upper plate against the upper gum did that plate fit normally against the inside of his upper lip?

A. You mean did his mouth here fit with his teeth?

Q. Yes. It is hard for me to explain. What I want to get at Mr. Hanley is this: did the lower edges of these artificial teeth in the upper plate occupy a normal position on the inside of the upper lip?

A. Yes sir, they were what you would call a normal upper lip.

None of these teeth in the upper plate were fractured or [52] broken. I found no other laceration or abrasion upon the face of the deceased.

Q. What did you do with respect to this condition that you have testified to as to the lower plate where the teeth turned outward?

A. I placed them back in place except one—well that wire, whatever you call it, the reinforcement broke at the edge.

Q. The end of this lower plate?

A. Yes sir, it broke when I pressed it back.

Q. Just describe to the court and jury if you can a little more definitely as to where that wire was pressed, attaching itself and running from the plate to some of the natural teeth, how was it held in there?

A. Under his lower teeth, six, I am pretty sure it was six or might be seven.

Q. Of the natural teeth?

(Testimony of E. V. Hanley.)

A. Of the natural teeth, this tooth here and this tooth here.

Q. Now when you say here, illustrating on either side of the six?

A. This was what we call a strap, four teeth or three teeth back into the molars, they were reinforced but they didn't have teeth back in here; they were reinforced enough on both sides that they held this in place. When I pushed them back in place one of them broke right away, that is the reinforcement broke, not the teeth but the reinforcement.

The reinforcement is a filling, they use as a wire, an alloy; I don't know what it is. That broke as I was placing the lower teeth back from the protruding position to an upright position. That is all of the lower plate that was fractured at the teeth. [53]

I examined the lower jaw of the deceased for fractures or injuries and found three fractures. These fractures were located on the right side in the middle of the lower jaw, one there, one at the curve and one at the point. One there and I pointed to what we call the middle on the side of the face, right there; one at the edge, right here, about below the right hand corner of the mouth, about there; and the third one about the center of the chin. There were no other abrasions on the chin.

Q. Did you examine the under side of the chin?

A. The chin was normal.

There were no bullet wounds or holes in the chin. There was no bullet hole or wound in the

(Testimony of E. V. Hanley.)

facial portion of the chin below the lower lip. There was no bullet wound in any portion of the side, of the left side of the face of the deceased; nor in his ear; nor his eye. There was no bullet wound or hole in the right side of the face of the deceased; nor in his ear; nor in his eye. There was no bullet wound or hole visible in his nostrils or nose.

Q. Was there any bullet hole or wound in any portion of his head, save and except the wounds you have described as being in the back of his head and about 3½ inches in diameter?

A. That is the only one outside of the one on the lip; that is the only one you might speak of.

Q. I am speaking of bullet holes or bullet wounds, were there any bullet holes or wounds in the top or side of his head?

A. No.

Q. Outside of this condition in the back of the head that you have told about I will ask you to state, Mr. Hanley, having as I think you testified to preparing the body for burial yourself. He had died from gun shot wounds? [54]

A. Yes sir.

In examining the deceased I did not find any evidence of powder marks on his face. At the time I first saw him he was dressed with a lumber jacket, flannel sweater, what you would call it, or jumper on the outside; that is after we dressed him he had on a pair of tan shoes, a pair of trousers, that is dark trousers with some kind of a stripe in them and undershirt, and this lumber jacket, or what

(Testimony of E. V. Hanley.)

you would call it, a lumber jacket, blazer like, a flannel blazer of some kind; some call them different names I guess.

In my occupation and profession in preparing bodies for burial and in taking care of lacerations, morticians or undertakers use a filling preparation. It is usually called a filler. In preparing the deceased for burial and in fixing up his face, I did not use any filler. There was no holes or depressions requiring it.

Re-Direct Examination by Mr. Meyer.

The WITNESS: One of these natural lower teeth were broken on the right side and none of the others to my knowledge.

Witness Excused. [55]

ROSCOE THOMAS

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Christian.

The WITNESS: My name is Roscoe Thomas; I reside in Butte, and have lived in Butte, about 20 years. I am a certified public accountant, licensed to practice in Montana, and have been in that occupation about 29 years.

I was acquainted with E. Walter Gamer in his lifetime and am also acquainted with the corpora-

(Testimony of Roscoe Thomas.)

tion known as Gamer's Confectionery Incorporated. My connection with them is that I have audited their books and prepared financial statements and income tax returns. I am thoroughly familiar with the business so far as the accounting goes, and I was familiar with the accounting end of the business during the years 1932 and 1933. I know about the insurance that they received after the fire in their business in October, 1932.

Q. What sort of insurance did they have?

Mr. POORE: That is objected to as incompetent, irrelevant and immaterial, does not prove or tend to prove any issue in this case. The sole issue is whether or not Walter Gamer committed suicide, and this testimony is irrelevant for any purpose.

The COURT: Overruled.

Mr. POORE: Exception. May this objection go to this entire line of testimony, assuming it will be similar.

The COURT: I am assuming that the purpose is to show the financial condition of the deceased.

Mr. CHRISTIAN: Yes.

The COURT: Very well, the same objection and same exception [56] will be considered as made and taken to each question along this line.

A. They have Fire Insurance and Use and Occupancy Insurance.

I aided in adjusting the Fire Insurance loss. As I remember they received around $32,000.00 Fire Insurance for the fire in their place of business; and they received about $7,500.00 Use and Occu-

(Testimony of Roscoe Thomas.)

pancy Insurance. The Use and Occupancy continued for about 3 months after the fire. Use and Occupancy Insurance is against loss of profits and compensation for indispensable help, and overhead purposes.

On April 25, 1933 I prepared a Trial Balance of the financial condition of Gamer's Confectionery Incorporated, which I have with me. I don't think there was any material change between the time of the fire and the time of the preparation of this Trial Balance in the financial condition of the Company. I don't have the comparison. There was no material change between April 10, 1933, the date of Mr. Gamer's death and the 25th day of April, 1933, when I prepared this statement. The expenditures made in that period, between April 10th, and the 25th, by the Company were $1,047.56. On April 25th, the time this financial statement was prepared, the Company had a bank balance of $10,394.57 and that was divided between the Metals Bank and Trust Company and the First National Bank. Gamer's Confectionery Incorporated also owned fifty shares of first bank stock corporation. There was also a salvage from the fire such as fixtures and stock and things like that. The salvage of furniture, fixtures and equipment and so forth was a considerable amount; the salvage of groceries and supplies wasn't so much. On the date I prepared the Trial Balance, Gamer's Confectionery Incorporated had very little indebtedness, the total amount being

(Testimony of Roscoe Thomas.)

probably $1100.00 all told. From my [57] statement and testimony they had approximately $10,500 in the bank and only owed about $1,100.00.

Mr. Gamer was an officer and stock holder of Gamer's Confectionery Incorporated and he owned five twelfths of the company; he owned five-twelfths of the capital stock; owned it personally. Mr. Gamer had power to draw checks on the balance in the bank. Between the time of the fire and the time of his death Mr. Gamer received monies from Gamer's Confectionery Incorporated and that represented cash withdrawals; part of it was dividends and part cash withdrawals. I prepared Walter Gamer's tax return for the year 1932, that is his Federal Income Tax Return. The gross income of Walter Gamer during the year 1932 was $11,493.43. That was his personal gross income during the year 1932. This sum of approximately $11,500.00 which was in the bank on the 10th of April, was subject to the company's check signed by Mr. Gamer. In other words if he needed money he could have drawn a check without anyone else's signature. I don't know what this First Bank Stock Corporation Stock was worth at the time of Mr. Gamer's death; I haven't those figures. There were no other stocks or assets of the corporation besides what I have enumerated, that was about all; it consisted of cash in the bank and salvaged fixtures and equipment and a small batch of groceries

(Testimony of Roscoe Thomas.)

and candies. There were a few Accounts Receivable, $449.00.

Cross Examination by Mr. Poore.

The WITNESS: On April 25th, 1933, the day I drew the Balance Sheet the bank balance was $10,394.57. That was the total cash in bank and on hand and out of that there was an indebtedness of [58] approximately $1100.00 owing and that would leave a balance of approximately $9,200.00. Walter Gamer owned five-twelfths of this business. In addition to that $9,200.00 which the company owned it also owned fifty shares of First Bank Stock. I could not say that that was worth less than $7.00 a share in 1933. I didn't look the market up and would not be able to say. I know that it was below $10.00 during 1932 or 1933; but I don't know it was around $7.00. Other assets which they had besides the cash balanee and the $500.00 worth of stock they had Notes Receivable, $144.99. I don't know how long they had been due as I didn't check that up; don't know whether they were collectable or not. They also had Accounts Receivable, $449.88. I don't know whether or not those were collectable accounts as I didn't check that feature up. I don't know whether any of those accounts had been charged to Profit and Loss or not. Other assets the company had was the salvage in the furniture and fixtures and equipment of the store. That was carried on the books at about $5900.00. That was

(Testimony of Roscoe Thomas.)

not simply a book entry, but a salvage value of the fixtures as shown by the Fire Insurance Adjuster and it was compensated for. They also had a small amount of groceries, salvaged groceries. I don't recall exactly the amount but I imagine $400.00 or $500.00. I have no record to show what it was. I think its maximum amount would be $500.00. That is all the assets they had. I don't know what the total amount of that would be as I have not added it up. The bank balance, after paying $1100.00 in debts, would be $9,294.00; $500.00, the maximum value of the First Bank Stock; $144.99, Notes Receivable; $449.88, Accounts Receivable; $5,900.00 value of furniture and fixtures after the fire and about $500.00 groceries and supplies, and the total amount of that would be [59] $16,788.87. Assuming that that business was liquidated at that time Walter Gamer would receive five-twelfths of that, which would be less than $8000.00. That was the assets of the Gamer Confectionery Company in 1933. It was destroyed by fire as I remember October 8th or 9th, 1932.

Q. And Walter Gamer had been out of work from the time that place of business was destroyed by fire in October, 1932, until the date of his death in 1933?

A. He was still working for the corporation.

I don't remember now what salary he did draw from the corporation, but he drew a salary. The salary would not be charged to this $16,788.87 be-

(Testimony of Roscoe Thomas.)

cause that would be the net. He was paid a salary each month, and that figure, $16,788.87 was the net on the date of his death. I don't know what salary he drew; did not bring that data with me. He also had some, what he considered, indispensable help who drew a salary for a while, his cook and pastry cook and floor walker, he paid them for a while. I don't know what the name of the floor walker was, but she is still at Gamer's Confectionery now. I cannot recall how many indispensable help there were. I have not with me the amount that was paid out for indispensable help. If Mr. Gamer drew any checks on the Gamer Confectionery account he drew it on either dividends or salary.

The capital stock of the company was $50,000.00. Its present worth on April 10, 1933, was $16,788.87. No dividend could be withdrawn from that unless it be capital disbursement. If any amount were withdrawn from that after April 10, 1933, by any person it would have to be a return of capital or borrowing.

Walter Gamer's personal income for the year 1932, that is [60] the gross income, was $11,493.43; and the net was $10,443.95; of that amount $4166.85 was made up in salary; none of it was made up in interest; he had no money on interest; of that amount $7531.97 was made up in dividends. Part of that amount was dividend from the Gamer's Confectionery; $7500.00 was dividend from the Gamer's Confectionery. He had $7500.00 from dividends in Gamer's Confectionery the preceding year and $31.97 in dividends from some other source.

(Testimony of Roscoe Thomas.)

Q. The destruction of his business in 1932 cost him dividends in the business $7500.00, a salary of $4166.85, and reduced the capital to $16,788.87,—of which he owned five-twelfths——

A. Yes and withdrawals.

Q. How much interest had he?

A. Well Walter Gamer paid in the year 1932, $882.69.

Q. That is interest?

A. Yes sir.

Q. And capitalizing that at 6%—do you know what rate of interest he paid?

A. No.

Q. Capitalize it at 6% it would be ——

A. About $14,700.00, nearly $15,000.00.

Other deductions which he claimed in his Income Tax Return which I prepared for the year 1932 as against his net income was taxes $166.79, and he claimed some expenses for the firm $205.37. That is all.

I think probably I prepared the Income Tax Return for his Estate from the 1st day of January, until the 10th day of April. I haven't got that with me but can get you a carbon copy. His gross income from the 1st day of January, to the 10th of April, 1933, was $1863.38. That was composed of salary $300.00 and dividends [61] $1563.38. Those dividends were probably from the Gamer's Confectionery but I haven't that information to show what source they were—yes, Gamer's Confectionery. That

(Testimony of Roscoe Thomas.)

was the sole source of dividends. He paid an Income Tax of $49.36 for the year 1932. There was no tax paid for the year 1933 up to the time of his death.

Re-Direct Examination by Mr. Christian

The WITNESS: The capital stock of $50,000.00 in Gamer's Confectionery was supposed to be the net; the authorized capital was $100,000.00. They had $50,000.00 that was never subscribed or paid for, leaving $50,000.00 net. I have the opinion that that was paid in, in either capital or money. Between the time of the fire and the time I made this Balance Sheet, Gamer's Confectionery had expended approximately or most of $32,000.00 received from insurance. They paid up some bills, and withdrawals mostly, by three members of the firm; part were dividends and part charged against capital, and that is the manner in which the net assets of the company had been reduced to something like $16,000.00. That does not include Good Will or anything of that source.

Q. Would not the company have a Good Will value if re-established?

Mr. POORE: Objected to as speculative.

The COURT: Overruled.

Mr. POORE: Exception.

A. That would be rather conjectural.

During 1932, Mr. Gamer drew out $7531.97 in dividends—$7500.00 dividends, and of course that would have to be out of [62] earnings; might have

(Testimony of Roscoe Thomas.)

come from insurance money. At all times after the fire I was still employed by the company. The information they gave me from time to time was that they contemplated r -establishing the business.

Q. As a matter of fact after that the business was re-established?

Mr. POORE: Objected to as immaterial.

The COURT: Overruled.

Mr. POORE: Exception.

A. Yes sir.

Re-Cross Examination by Mr. Poore.

The WITNESS: I said the Gamer's Confectionery was in business now. The same business is re-established. Walter Gamer's Estate has no interest in it. The same business is re-established in which Walter Gamer had an interest. Walter Gamer's Estate has no interest in the re-established business.

This $7500.00 that was earnings as shown by 1933 Income Tax Return for year 1932—was earnings because it was enumerated in the Income Tax Returns and couldn't be anything else but earnings or it would not be there.

Q. So his income was depleted by $7500.00 and salary of $4000.00 between the years 1932 and 1933?

A. Well the available source of his income was yes.

Re-Direct Examination by Mr. Christian.

The WITNESS: During the first 4 months of 1933, Mr. Gamer [63] still had an income of $465.00 a month approximately.

(Testimony of Roscoe Thomas.)

Q. You stated in reply to Mr. Poore that the Gamer Estate was not interested in the Gamer's Confectionery Incorporated. Did I understand you correctly?

A. As a stockholder.

Q. As a matter of fact they still own five-twelfths of record, do they not?

A. Yes sir.

Q. Still own 416 and 2/3 shares in the company?

A. I am not sure, I don't know whether they do because I don't handle that feature of it.

I haven't the records and don't know whether it has been transferred or not; I haven't had occasion to look at the stock records. I handle the transfer of stock. I haven't had the books for quite a while. I don't know whether the 416 and 2/3 shares which Mr. Gamer owned in Gamer's Confectionery has ever been transferred or not.

Re-Cross Examination by Mr. Poore.

The WITNESS: Mr. Christian asked me if he didn't have an income of $400.00 a month in 1933, that is dividing $1863.38 by the months of January, February and March, and 10 days in April. $300.00 of that was salary and $1563.00 of it was dividends from the Gamer Confectionery, which had been destroyed by fire and after the capital had been depleted from $50,000.00 to $16,788.87.

I don't know exactly whether Walter Gamer's Estate has any interest whatever in the Gamer Con-

(Testimony of Roscoe Thomas.)

fectionery Company which is now being operated on Park Street at a different location and I don't know whether the stock has been transferred on the books of record or not; or whether it has been transferred to some other [64] person and not transferred on the books, as I have not seen the records for some time.

The COURT: It seems to me that we would like to know what the witness does know. Confine the examination to what he knows and not what he does not know.

Q. Mr. Thomas do you know or do you have any information concerning Walter Gamer's Estate in the Gamer's Confectionery?

A. I have no information right now just how these stocks stand, whether transferred or not I don't know.

The COURT: This examination has gone far enough; if he don't know he cannot testify. Proceed to something else.

Mr. POORE: Alright. That is all.

Witness excused.

Mr MEYER: At the last trial of this case

ALEX ANDERSON

testified as a witness on behalf of the plaintiff. Since that trial he has died. His testimony has been transcribed and we have a copy of the tran-

(Testimony of Alex Anderson.)

script of his testimony and we now offer in evidence the transcript of testimony of Mr. Anderson.

Mr. POORE: That is agreeable.

Mr. MEYER: Gentlemen of the jury, the testimony of Alex Anderson as given on the last trial of this case is as follows: (Reading) Alex Anderson called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Meyer.

The WITNESS: My name is Alex Anderson. I reside at 838 West Mercury. I have lived in the city of Butte, 51 years. I knew [65] Walter Gamer in his lifetime and had known him 12 or 14 years or more. That acquaintanceship was intimate. My family and Mr. Gamer's family changed visits with each other quite often. Mr. Gamer's disposition was cheerful, a good disposition, jovial disposition. I should say he seemed to enjoy life. I last saw Mr. Gamer Sunday night before he died, Sunday evening at his home. I was in his company about 2 hours. I got there about 8:00 o'clock in the evening and left about 10:00, a little after. I conversed with him that evening. His daughter Elsie Jane was also there in the room besides Mr. Gamer. After she retired just he and I were there alone. His disposition that evening was alright. I did not notice anything resembling despondency; there was no change from his usual disposition, not to my knowledge, not noticeable at least.

(Testimony of Alex Anderson.)

I always thought Mr. Gamer's health was alright. He never complained to me about being in ill health. He never complained to me about having any financial troubles.

I was at the Gamer home on the morning of April 10th. I should judge it was probably half past or probably a quarter to one or something like that when I got there. Mr. Gamer's remains had not been removed; they were there. I just slipped upstairs for an instant. I saw his body lying there on the floor. I don't think I saw the gun. His head laid in the hat; the back of the head lay in the hat. I last saw that hat I think the next following day and it was there and I carried the hat; it was all covered with blood and stuff and I wrapped it up in a piece of newspaper and put it out in the garbage can.

I used to be a fisherman. I never went fishing with Mr. Gamer. I have no knowledge of where he kept his guns and fishing paraphernalia, only what I saw that day in the closet. I went in [66] the closet after the body was removed and saw his fishing paraphernalia there. It was sitting in the back part of the closet. I did not see that gun there; I believe I saw the gun case laying on the floor; I am not sure but I think so. I don't know whether the case was loaded or not. I did not see the pistol there.

During my late acquaintanceship with Mr. Gamer, that is during the last few months prior to his

(Testimony of Alex Anderson.)

death, I did not notice any change in his disposition from what it had been during all the years of my acquaintance. I had seen him with his wife and daughter lots of times. I would think he was devoted to them from all appearances. I think they were devoted to him. They seemed to be happy in the company of each other.

Cross Examination by Mr. Kyle.

The WITNESS: I understand that Mr. Gamer in his lifetime was connected with the Gamer Confectionery Store on West Park Street of this city and had been for a number of years. That place of business was destroyed by fire on or about the month of October, 1932. From that time up to the time of Mr. Gamer's death he was not engaged in any business that I know of. He never spoke to me of his business affairs any more than that night he said, "We are just about getting ready to get started; things are looking alright now, and we are just about getting ready to get started up in the new store." That is what the conversation was quite all of that Sunday night.

Q. Had he during the time from the time of the destruction of this business by fire, up to this conversation you have related, did he ever express worry to you on account of his business affairs? [67]

A. No I wouldn't say so. He used to talk that he would like to get back to work again, getting tired of loafing.

(Testimony of Alex Anderson.)

He never told me he couldn't sleep nights or whether he was treating with physicians for insomnia. I arrived at the Gamer home on the afternoon of April 10th, in the neighborhood of a quarter to one. The body was still there; a portion of the body in this closet. I don't think I saw the gun, not at that time. I made an observation as to the ceiling in the ceiling of the closet; I saw the hole in the ceiling. That hole was kind of an oblong hole and had a lot of blood and stuff around it; the hole was longer than it was round. It appeared to have been recently made.

Q. Were the edges jagged?

A. Well, plastering you know how that would be, I think it was kind of ragged.

There were spots in the locality of the hole. I think those spots were blood.

Witness excused. [68]

HUGH CUMMINGS,

a witness called on behalf of the plaintiff, being duly sworn testified as follows:

Direct Examination by Mr. Christian.

The WITNESS: My name is Hugh Cummings; I live at 1911 Grand Avenue, and I am a salesman. I have lived in Butte, since 1907. I was acquainted with Walter Gamer in his lifetime and had known Mr. Gamer approximately 25 years. My acquaint-

(Testimony of Hugh Cummings.)

ance with him was very close, an intimate acquaintance. I know where he lived in this city and I visited at his home very many times. I took care of his home on occasions when he and his family were away from the city and I resided there at that interval. I was acquainted with the entire house.

Mr. Gamer weighed from 175 to 190 pounds; his height was around 5 foot 10, I believe. In the last ten years I had seen Mr. Gamer prior to his death approximately every business day of the week that he was in town. The occasion for seeing him so often was selling him merchandise at the store and I saw him then personally. Mr. Gamer's disposition was very jovial, happy-go-lucky, a cheerful person. I never knew him to be morose or depressed. He always enjoyed life as far as I knew.

I am not absolutely certain as to the last time I saw Mr. Gamer, it might have been a week or might have been longer and might have been less, I am not certain, prior to his death. That was here in Butte. His attitude and disposition at the time I last saw him, prior to his death, was nothing different. He always appeared the same and it was the same as it had been for many years. I couldn't see any change at that time of any kind; didn't notice any change of any kind; he didn't seem depressed or [69] despondent or discouraged.

I know Mr. Gamer's family. Mrs. Gamer and daughter Elsie Jane. Mr. Gamer's attitude toward

(Testimony of Hugh Cummings.)

his wife was nothing but the best. They seemed to get along nicely. I would say his attitude toward his little girl was 100%. They romped and played together. He seemed to be very fond of her. The little girl's attitude toward her father was absolutely the same as the father to the daughter. I did not see anything but harmony in the Gamer home. They seemed to get along very nicely. Mrs. Gamer's attitude toward her husband was nothing but the best.

Mr. Gamer and I had spoken about his business affairs. He never made any complaint about being financially embarrassed to my knowledge, not that I remember at the present time. I knew him intimately and went around with him considerably. Anytime I was out with him he seemed to have plenty of money, right down to the time of his death. I couldn't see any change in his health as far as I could see. The nature of his health was nothing but the best. He was a large, robust man. I never heard him complain about any illness more than he might have a cold or headache or something of the kind, nothing serious.

Mr. Gamer and I had gone fishing together often. On these fishing trips his physical condition was generally so that he could do more than keep up with the rest. He was what we call peppy.

I went out to the Gamer home on the 10th of April, 1933, at somewhere between 11:30 and 12:00 o'clock. When I arrived there Mrs. Gamer was

(Testimony of Hugh Cummings.)

there, as I remember it, and Elsie Jane and Malcolm Gillis and I believe Dr. McHaffey and possibly other people that I didn't pay attention to. After I got to the Gamer home I went upstairs. I am familiar with the room and closet [70] spoken of here. I am not exactly certain as to the measurements of that closet but I would say around possibly 3 feet wide and maybe 8 feet long. I had been in that closet many times. His clothes were kept in that closet and his fishing outfit and his gun and hunting equipment. There were clothing hooks on the sides of the closet, both sides. On this morning, April 10, 1933, when I went there, there possibly was clothing hanging on them, but as far as my looking into the closet or paying attention to details at the time, I couldn't state. I had seen the closet on other occasions and it was always full of clothing.

Q. Was there a pole on the east side running north and south?

A. There was a pole to hang the clothes on, yes. Clothing, suits and overcoats hung on the pole; I had often seen it. It might have been the afternoon of his death, that evening, or next day, I am not positively certain as to the day that I was in the closet. The suits of clothing were still there at that time, hanging on both sides and in the end. This closet was always more or less full of clothes, shirts and overcoats and he kept his hunting and fishing outfit in there. When you got into this closet you would naturally have to brush against

(Testimony of Hugh Cummings.)

some of these things if you got in the back end of the closet.

I was familiar with Mr. Gamer's habit of keeping fire arms in this closet. He kept the rifle in there and he kept a shot gun in there and a revolver. The rifle was kept in the southeast corner, I believe, of the closet; and the shotgun was partially in the same corner; the guns were kept in the same corner. The revolver was kept on a shelf in the closet. This shelf was up in the left hand side of the closet going in and that would be the north side.

I saw Mr. Gamer's body on this morning, April 10th. He [71] was lying on his back approximately, his knees were in the closet; the rest of his body was out in the bedroom. I am not positively certain but I believe his head was to the south, or the right. The body was lying east and west. The head was, I am rather inclined to believe, a little to the south. The head was at the west end of the body. When I saw the body it was dressed in the usual fishing garb, I believe; there was a khaki shirt and a blazer that he wore fishing all the time; a khaki pair of pants and a pair of shoes. The body on this morning was dressed in clothing that I had seen Mr. Gamer go fishing in before on numerous times. I was well acquainted with the clothing. There was a hat there. As I remember it, the hat was lying partially under the neck, the head and neck resting on the hat. This was a hat I had seen

(Testimony of Hugh Cummings.)

before many times when I had been out fishing with him. That was the same hat and clothing he wore on fishing trips. I saw a firearm there that morning. I am acquainted with this rifle which you show me and I have seen it before. I saw that rifle in the closet over there and it is the property of Walter Gamer. I have seen it many times and know that to be the fact. I don't know what caliber it is. The rifle was there in the room that morning. As to the exact position it was in I couldn't state.

Mr. CHRISTIAN: At this time we offer the rifle in evidence.

Mr. POORE: No objection.

The COURT: Admitted in evidence without objection.

Rifle marked plaintiff's Exhibit 1.

The WITNESS: I cannot state as to the exact position that the rifle was. I saw Mr. Gamer have that rifle along on numerous occasions, on fishing trips and also hunting trips when I was with him. There was no case for the rifle as far as I know. [72] There was a shotgun which was always kept in the closet. I couldn't state as to whether it was there this morning or not. It was there when I looked afterwards and that shotgun was in a case, a regular shotgun case; a regular uniform shotgun case. That shotgun was one that could be taken apart or broken and it fitted in the case after it was broken but not before.

(Testimony of Hugh Cummings.)

It would depend upon the season of the year as to how often Mr. Gamer and I would go fishing together; we might go 2 or 3 Saturdays in a row and might be 2 weeks or something like that before going again. Mr. Gamer generally took a firearm along in the car on those fishing trips. I don't recall an instance that he didn't take some kind of a firearm in the car.

I know of Mr. Gamer buying some new clothing before his death and I believe it consisted of 2 suits of clothes and an overcoat.

This shotgun that I spoke about, I took it out of the closet afterwards. I looked around the closet and the bedroom, that has been described here. I did not find any note or message or anything of that sort, nothing whatever. At that time I did not see anything that appeared to be a bullet hole around there, but afterwards I did. It was somewhere in the center of the closet, the exact spot I really couldn't state. It was on the inside of the closet in the center in the ceiling. I was there when the Coroner came and I remember the Coroner making a request for someone to unload the gun, and I responded and unloaded the gun. There was one shell or bullet in the gun,—it was a shell, one empty shell. I tried it to see there was nothing else in the gun. There was no blood on the gun when I unloaded it that I recall; I didn't notice any. When I went there, there was a cigar stub, I believe, on the window sill in the closet and that

(Testimony of Hugh Cummings.)

was the window sill on the south side of the closet; there was a cigar stub lying on the [73] window sill. I don't recall seeing a plate of false teeth; and don't recall seeing the glasses.

Cross Examination by Mr. Poore.

The WITNESS: I am not married; I live at 1911 Grand Avenue in Butte, and have lived here since 1907. I am a salesman and I sell fresh fruit and produce for the Miller Produce Company and have sold for Miller since 1921. I had known Walter Gamer approximately I would say aroumd 25 years. I did not know him before I came to Butte. I visited at his home and has been out to my place many times. I am not absolutely certain as to the last time I saw him before the 10th day of April, 1933, whether it was around a week or less than a week or more, I am not absolutely certain to the day. I don't know exactly where or when or how long and I couldn't state to be exact. It would not be a month before, it was less than a month. I am not absolutely certain as to whether it would be 3 weeks before—I saw him less than 3 weeks before his death, but as to the exact time, 7 or 8 days, or as to the exact date I couldn't state. I don't recall exactly where it was and I don't know the circumstances of seeing him. From that time up to his death I don't know what his state of mind was and I don't know anything about him for at least a week before he died.

(Testimony of Hugh Cummings.)

I think it was either January or February when I last went fishing with him, of the same year, but I am not absolutely certain whether it was January or February. We did not then cut a hole in the ice to fish. The water was open on the Ruby in spots. I could not say the exact date of that. On that fishing trip he had the usual fishing clothes that he wore on. He did not wear the [74] same clothes in January that he wore in July, when he went fishing. I am not positive as to what he had on in January, when he went fishing; couldn't state exactly what he did have on. The clothes he had on when he went fishing in July and August would vary, the same as anybody else would; he might have just a pair of pants and shirt, a pair of shoes. He had a couple of blazers that he wore when it got colder and a heavy khaki shirt. He had regular fishing clothes and they were a khaki shirt, that he wore, a pair of khaki pants and he had a pair of puttees. Of these garments I believe he had on the blazer at the time he died and he also had his shoes on and hat.

Q. Did he have on these garments you say were his fishing clothes?

A. Well I have seen him out in them fishing many times.

He didn't necessarily have any regular fishing outfit, but he did as the rest of the fishermen do who fish in the old clothes they have, and when a suit gets too old to wear around town, use it in

(Testimony of Hugh Cummings.)

fishing, like the rest of us, and that is what he did.

I saw him take the gun with him fishing many times. Some times he had the shotgun and sometimes this gun and sometimes a pistol. I have seen him use this rifle. I never knew him to be otherwise than careful with a gun. My experience is that he was always careful. I use a gun myself and I know what being careful with a gun is. Besides the rifle he had a shot gun which was a double barrel. I don't know the make of the shotgun. Right now I don't know whether it was a hammer gun or a hammerless and couldn't state to be sure; and I don't know the bore of it. I don't know what kind of a gun it was, whether it was an under, or over or parallel barrel. I saw the shotgun and it was a double barrel shotgun. I never looked to see the make. I know to break [75] the gun you have to press a lever. You have to do that with every gun that is a double barrel gun. I couldn't state what guage it was; don't know whether it was a ten, or twelve or sixteen or twenty. It had the ordinary shotgun case, a two piece case. I saw that gun in the case after Mr. Gamer's death but I am not certain as to whether it was that evening or the following day or following night. The case was closed when I saw it and it was in the clothes closet, but I couldn't say whether it was laying flat or standing on end. It was standing in the southeast corner of the closet.

Q. Where was this pistol you spoke of?

(Testimony of Hugh Cummings.)

A. There was a shelf in the clothes closet on the north side.

That would be on the left hand side as you entered. I don't know exactly how high that shelf was from the floor, possibly around 6 feet. It was a narrow shelf; I didn't measure how wide it was. I am not certain whether it runs clear through the closet or partially through.

Q. What kind of gun was it?

A. It is a revolver, but as to the size of the gun I don't know.

I couldn't tell you what kind of a revolver it was; I never used it. I possibly saw it being loaded; I never loaded it. I didn't examine it when I found it there to see whether it was loaded or empty. I did touch it but didn't look to see whether it was loaded. I did not leave it there but I took it out and put it in the other room; I put it in the closet in one of the other rooms of the house.

Q. In what room?

A. Let us see—when you get to the top of the stairs, right at the top of the stairs, there is a room directly off the stairs [76] east; It was in this closet, in that room I put the gun.

I put it in the closet in that room and I don't believe I even looked to see if it was loaded; couldn't answer that question. I believe I told Mrs. Gamer I put it there; I think Mrs. Gamer was with me at the time. I just told her I put the gun in the closet. He had 3 guns. I told her I put the

(Testimony of Hugh Cummings.)

shotgun and the pistol in the closet; told her I put the shotgun and pistol in the other closet. I don't know why I put them in there,—just to clean out the place is all, of all I could see. I don't use guns very often myself. I do fish. I couldn't state whether the fishing tackle was in that closet at the time or not. He kept his fishing outfit there but I don't know whether it was there or not at this particular time. I did not see it at the particular time I found Mr. Gamer's body. At that time the clothes closet contained different articles, clothing, suits, hats and clothes that any man would have. Some of those clothes were hanging on the wall and some on this pole. Those hanging on the wall were usually hanging on clothes hooks. As to whether they were on hangers or not, at that time, I couldn't answer. Anyway they appeared vertical on the wall, hanging on the wall and they appeared to be hanging on hooks as near as I can tell; clothing hanging on the north and south side of the closet both, and there were hooks on both sides. I couldn't state whether there were clothes on hooks on both sides or not. The closet was generally full of clothes. I couldn't state exactly whether the clothes were on hooks on both sides or not at the time I found Mr. Gamer's body. Clothes were always kept on this pole that was fixed north and south on the east end of that closet. I couldn't state what were there at the time I found Mr. Gamer's body; I didn't examine and so I don't know. [77]

(Testimony of Hugh Cummings.)

Q. What else was in the closet besides these clothes at the time you found Mr. Gamer's body in the way of clothes or any article?

The COURT: He testified he made no examination, both on Direct and Cross. Now he cannot know if he made no examination it seems to me.

Mr. POORE: If he says he doesn't know——

The COURT: He testified on Direct and Cross he made no examination and didn't know. I don't want to limit your examination but it seems to me it is immaterial.

Mr. POORE: Alright.

Q. How did you happen to go to Gamer's home that morning?

A. I received a telephone call.

I couldn't state right now from whom it was. Somebody told me there was an accident over there and to get over there as soon as possible. I did not receive it from the home. I got out to the home some where between 11:30 and 12:00 o'clock; am not absolutely certain as to the exact time. When I arrived Mr. Gillis was there, Mrs. Gamer and Elsie Jane were there and Dr. McHaffey and possibly others were at the home, but I couldn't state as to who they were. I was there when the Doctor went upstairs, but wasn't there when the Doctor came. Dr. McHaffey when I got there. I think Dr. McHaffey accompanied me upstairs and nobody else. I think Dr. McHaffey and I were the only ones in the room where the body was when I arrived

(Testimony of Hugh Cummings.)

there. The body was laying,—he was laying on his back; approximately up to the knees was in the closet and the rest of the body in the bedroom. The limbs were extended flat on the floor. I would say laying full length on the floor, head to the west and that of course would leave his right arm to the south and left arm to the north. [78] He had a hat partially on the head and neck. The hat would not be extended up so that it would reach the top of his brow. I am sure of that. I saw the gun there but as to the exact position of the gun I couldn't state; would not want to say. As a matter of fact I was somewhat excited and I did not pay as close attention to the matter of that kind as I would under some different conditions. I did not at the time notice any wound in the head. I did not afterwards personally examine the head; did not make any examination of the body at all myself.

Mr. Gamer was somewhere in the vicinity of about 5 foot 10 inches tall. I am about 5 foot 9. and he was a little taller than I am. He weighed between 170 and 190 pounds. We weighed many times and I seen him weigh around that weight, about 180. He was approximately the same weight as I am and a little taller than I am. How often I would visit his home would depend, some times I was out there every day or every evening and other times I would not be there for a certain period of time, maybe a week or two weeks or three weeks. Usually when I went out there I sat down and visited and went out there and had dinner many times. When I

(Testimony of Hugh Cummings.)

went out there I visited with Walter and the family was there altogether. Walter and I usually did not visit by ourselves necessarily. The folks were generally there in the room together; we were all in the room together.

Q. Now you don't know anything about his business condition or business relationship or matters of that kind do you?

A. I have often talked over business with him. That would be business in which I was interested, and the same applied to him. At different times we talked about his personal affairs.

He bought 2 suits of clothes and an overcoat some time [79] before his death; he showed them to me sometime prior to his death; I couldn't state the exact time; it maybe 10 days or 2 weeks or something to that effect. I believe he bought them from Olson, the tailor. I couldn't say whether he has any place of business in town at the present time or not; I haven't seen him for some time. I am not certain as to whether he did then or not.

I saw this bullet hole in the ceiling but did not see that at the time I went up to view the body. It may have been the following afternoon or it may have been that evening, I am not certain as to the time when I did see it. I couldn't state whether anybody was with me or not; I am not certain as to whether I went up there alone or somebody went with me. This bullet hole was somewhere in the center of the closet in the ceiling. When I say the

(Testimony of Hugh Cummings.)

center of the closet I do not mean the center line between the north and south wall, but I mean the east and west. I am not absolutely certain as to how far it was from the door, from the entrance; I don't know. I couldn't state how far it was from the north wall of the closet, and I couldn't swear to how far it was from the south wall of the closet; I am not absolutely certain as to how far it was from the east wall of the closet, but it was in the ceiling in the plaster. I couldn't state how large that hole was. I didn't go into any examination at all.

I opened the gun for the Coroner after Mr. Gamer's death. In opening the gun I threw the lever down and from the chamber of the gun came an empty shell and that was the only shell loaded or unloaded in that gun. I turned that empty shell over to the Coroner and have not seen the empty shell since that time. I did not see any box of shells in that closet and I did not see any [80] rifle shell in that closet at all. I did not see any loaded shells which fits this rifle now in evidence in that clothes closet at any time at or after Mr. Gamer's death. I took some things out of the clothes closet; the things I took out was 2 guns and his fishing outfit. I took his fishing outfit out of the closet at the same time I took the shotgun out but I don't know exactly when that would be, but it was that evening or the next evening, I am not certain. When I removed the fishing outfit from the closet it was in the south-

(Testimony of Hugh Cummings.)

east end of the closet. Mr. Gamer was quite tidy and neat in his arrangements there. I couldn't state whether he had anything laying around over the floor in disorderly fashion or not. He was always neat about his buildings. His clothes were ordinarily always hanging up. I did not see any laying on the floor in the closet at that time.

Mr. Gamer kept his shells for this rifle at home in a drawer in the bedroom in a dresser and that was the bedroom which led, or from which this closet led off of. I did not see those shells there in that closet after his death.

Q. Did you make any investigation to see if there were any shells there after his death?

A. In the closet?

Q. No sir, in that drawer in the bedroom?

A. I don't believe I could answer that question right now; no I don't believe I could answer it and be sure to myself.

I know that he kept the shells for this rifle in a drawer in the bedroom, and that this closet led off of. I did not examine that drawer after his death. I don't believe I could state when the last time was I saw him have shells in that drawer.

Q. Did you ever see him put a rifle shell at any other place in his home other than in that drawer?

A. He kept them in there. [81]

That is where he kept them all the time I knew anything about it. I have seen him take his pistol on fishing trips and I have seen him take his shot-

(Testimony of Hugh Cummings.)

gun on fishing trips. It depended upon the season of the year or the place where he was going as to what one he would take along. When he was on these fishing trips with a gun of some kind sometime he would use it for target practice. I have seen him use it to shoot game or birds of any kind. I have gone out hunting big game with him, hunting deer. The last time I was out hunting deer with him was November, 1932 and we went up on the Madison; Roscoe Thomas, Walter and myself, the three of us.

This cigar stub which I saw on the window sill, that was in the clothes closet. I did not remove it. I couldn't state whether it was on a tray or not. When I saw it there, it was laying on the window sill, right on the window, in the window sill, in the clothes closet, and that window sill was on the south side of the closet, which would be the right hand side as you entered.

Re-Direct Examination by Mr. Christian.

The WITNESS: I stated in reply to a question by Mr. Poore that I made no examination of the closet the first time I went up after arriving at the home. However, that evening or the next day I did go in the closet and all the suits and overcoats and other articles I described were still in the closet. When Mr. Poore referred to this pistol as a revolver, I make no distinction between a revolver and pistol, but am referring to the same gun.

(Testimony of Hugh Cummings.)

Q. Are you sure that you removed the pistol out of that closet [82] or only the shot gun?

A. Well my recollection of it was that we took both guns out of there; I am not absolutely certain and would not swear to it on a bible or anything of that kind, but I know I took a shotgun out of there and put it in the other room.

As to the pistol I could be wrong on that, but as I remember,—it is quite a while ago, I could be mistaken. This clothing that I referred to as Mr. Gamer's fishing clothing I had seen him wear that on fishing trips on numerous occasions, and the particular lumber jacket that he had on at the time of his death. It would be absolutely hard to state over how long a period I had seen him use that clothing, the same clothing, but approximately the same outfit he wore on these fishing trips or hunting trips. He had it long enough for me to be acquainted with it so that I recognized it the morning of his death.

Re-Cross Examination by Mr. Poore.

The WITNESS: When I examined this closet at the time that Mr. Christian referred to and the clothes in that closet were hanging in the closet, and hanging loosely in the closet and they were not down on the floor. They were hanging in the closet. As I said before, he wore his old clothes fishing, and old clothes hunting and his old clothes around the house. When I saw him dead he had

(Testimony of Hugh Cummings.)

on clothes that I seen fishing at times, with the same outfit on; and the same outfit I saw him working around the house,—I guess that would answer that.

Witness excused. [83]

CON MURPHY,

a witness, called on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Meyer.

The WITNESS: My name is Con Murphy. At the present time I am mining at Virginia City. During the year 1933, I held the official position in Silver Bow County, of Coroner and was Coroner on the 10th day of April, of that year. I did not know Walter Gamer in his lifetime. On the 10th of April, 1933, I had occasion, or was called, to the Walter Gamer residence in this city and that residence, at that time was at 805 West Silver Street. As I recollect it must have been between 12:00 and 12:30 that I was called to the Gamer home and when I got there I went in the door and there was some man in there, I think it was Malcolm Gillis and he said, "Upstairs partner" and we went up. We went upstairs and went into the room facing south on Silver Street and I seen the body laying there. The body was laying on its back and there was a clothes closet there and the body was in the clothes

(Testimony of Con Murphy.)

closet from probably the knees and the rest was lying in the bedroom. I would say the closet must have been probably 8 feet long and probably 3 feet wide. I know the closet was narrow. I saw the gun there. Plaintiff's Exhibit 1 on this desk looks like the gun, but I didn't put any particular mark on it, but it was a 300 Savage Rifle, a hammerless gun. When I got there the right hand of Mr. Gamer was down by its side, the gun was off this way a little; the hand up this way,—the muzzle of the gun here was pointed across the body and that would be the southwest direction, mostly west. [84]

Q. In describing this gun, the hold that Mr. Gamer had on the gun, how far beneath the sight——

A. I would say it was down about 6 inches; the hold was like that.

The COURT: With the left hand.

A. In the left hand like if the gun was being packed this way, it was ahold this way, it was just like that.

Q. With the thumb on the upper——

A. Well like that.

Q. Now did he have a tight or loose hold?

A. I just loosened his fingers and took the gun right out.

I would say it was a loose hold. I don't think there was any blood on the gun.

Mr. Gamer had on a pair of heavy shoes, and outer pants and undershirt and blazer jacket, and

(Testimony of Con Murphy.)

there was a felt hat there and it was all blood all through. His head, I think, was laying on the hat. His head was kind of in the inside. The hat was kind of crumpled up. The closet faces east and west. I saw false teeth there. They were just inside the closet. Dr. McHaffey picked them up and handed them to me and I gave them to the undertaker. They were kind of at the calf of the leg there and that was just inside the closet. I saw some glasses there and they were broken. They were laying inside of the closet close to where the feet were.

Shock and hemorrhage from a gunshot wound caused the death. Mr. Gamer's right hand was lying right down by his side.

Cross Examination by Mr. Poore.

The WITNESS: I was called to the Gamer residence and [85] arrived there between 12:00 and 12:30. I knocked at the door and I believe it was Malcolm Gillis who admitted me. I was Coroner on April 10, 1933, in Silver Bow County. Somebody called me to go to the Gamer residence, 805 West Silver Street, in this city and I went out there immediately. It was between 12:00 and 12:30. When I got there, there were 7 or 8 men there. I know Mr. Gillis was there and he said it was upstairs and I went and when I went up I saw the body of Mr. Gamer lying on the floor. I don't think there was anybody in the room where the body was when I arrived upstairs. I went in and viewed the

(Testimony of Con Murphy.)

body. These men came upstairs when I went up with Mr. Gillis. I went up with Mr. Gillis and these other men followed. You go up the stairway to the north and then turn back to the south. You enter the room on the south side of the residence, or facing on Silver Street. Leading off this room is a clothes closet. I found the body of Walter Gamer lying with his feet in the clothes closet around to the knees I would say, making a rough guess. The body was stretched out on its back with the head to the west, lying extended. It was not crumpled up, but extended.

He held this rifle, offered in evidence here, and marked Plaintiff's Exhibit 1 in his left hand.

Q. Now if I understand you correctly his feet were somewhat apart?

A. They might have been like that.

Q. That would be with the toes turned out?

A. I would not—it is a long time ago.

Q. I want what you know and that is all. And your best judgment is that the feet were separated?

A. A little, yes.

Q. How much would you say? [86]

A. Not far; I couldn't say how much, but not far.

Q. A few inches?

A. Might have been like that.

Q. That shows a separation of about 3 inches?

A. Well maybe.

(Testimony of Con Murphy.)

Q. Where was the stock of the gun with reference to his feet?

A. The stock of the gun was like that.

Q. The stock of the gun to the left of his left foot?

A. And the muzzle of the gun was kind of like that and across his stomach.

Q. Your best recollection is that the stock of the gun was a little to the left of his left foot?

A. A little to the left of his left foot.

Q. About the center of the gun across his left leg?

A. I couldn't say the center; I know this part here was kind of across his stomach in here.

Q. And he had a hold of the gun how?

A. Right there.

Q. You are holding the gun in your left hand with your fingers and thumb clasped around the barrel about 6 inches from the muzzle of the gun, and that is the way Walter Gamer held the gun?

A. To the best of my recollection.

There is no doubt about him having it clasped in his hand. I took his fingers off and they came out like that, and removed the gun from the clasp of his hand and took the gun from him. That is the position in which I found the gun, at the time I entered the room where his body was.

I did not eject the shell from this gun but I asked another man to eject the shell because I wanted them to eject it instead of me and I wanted to see what was in it. The gun [87] had the lever closed. As

(Testimony of Con Murphy.)

he ejected that shell he threw the lever down and that threw the empty shell out of the chamber. This empty shell in the chamber was the only shell in the gun and we ejected 4 or 5 times to see if there was any other in there and there wasn't. There was no loaded shell in the gun. We ejected the empty shell from the chamber. I had that shell which was ejected from the chamber in the office and Malcolm Gillis came up and got what belonged to Mr. Gamer and got this gun and he gave the County a receipt for it and the shell lay around there four or five months and one day the stenographer was cleaning up and I think she threw the shell out. Mr. Gillis didn't take the shell; it was left in the office and I think that is what happened to it. As I recollect the things which I took possession of besides the shell were a knife and keys and a little change, and those were all in the pockets.

I looked the body over at that time, made an examination. I found the blood was running from the back of the head.

Q. And the back of the head was blown out?

A. It was on the floor and I didn't examine it. I did not examine it after that. I looked at the face and it was all blood and I thought there was a laceration on the lip, I thought that is where the bullet entered but I didn't make an examination.

Q. And that laceration was on the left lip extending towards the nose?

A. I forget which side it was.

(Testimony of Con Murphy.)

I saw no other wound on the face; the face was all blood. I looked in the closet and I was in there. I saw a bullet hole in the ceiling of the closet and it was close to the door; I would say it was maybe 18 inches to the best of my [88] judgment from the door or something like that, but of course I didn't measure it. I couldn't state which wall it was close to; it looked kind of around the center. That was a plaster ceiling. As I recollect the bullet hole was a hole about the size you could push a lead pencil in. There was some blood and some flesh surrounding this hole.

I also saw a cigar butt on the window sill of that closet. That cigar butt was just lying on the wooden window sill. The window in the closet is right as you enter the closet to the right.

Q. Now the gun which has been shown you, is that the gun to the best of your ability?

A. It was a gun just like that; I didn't put any special mark on the gun.

I know it was a 300 Savage Rifle. I believe the model of the gun was 97, something like that or it might have been 99, 97 or 9. If there is no model 97 then it was 99. That means that the gun came out in 1899.

I just looked around in the closet and there was lots of clothes hanging around. They were all hanging on hooks or whatever they hang them on; I didn't look very much; but they were all hanging up. I saw false teeth there. I think Dr. McHaffey

(Testimony of Con Murphy.)

picked them up and gave them to me and I gave them to the undertaker. I don't know whether that was a set of upper false teeth or not. I didn't examine them closely, just gave them to the undertaker. I saw a pair of glasses there and they were picked up close to the teeth in the closet. I didn't notice what kind of glasses they were. I don't believe they were horn-rim glasses, dark glasses; I just handed them over and I am not able to say. They were broken around the bridge and one [89] glass I think was broke. I handed them over too; I think I put them on the bed with the rest of the trinkets in his pocket. I was in the house altogether, after I got there, probably half an hour and I was there when the body was removed. I saw the hat on the head. It was kind of on the head and the head was laying back on the hat. The head didn't cover the hat all. The head was kind of in the hat. It was a felt hat. I was there when the undertaker removed the remains. I looked around to see if there was a note or anything there and I didn't find any and that is all the examination I made.

I had been Coroner 2 years. I was not excited at all at this scene I saw there. That was a matter which in my business happened to be more or less of a usual occurrence. I am clear in my statements as to what I saw. There is no doubt in my mind that the gun was clasped in his left hand. I took the gun out of his hand.

(Testimony of Con Murphy.)

Re-Direct Examination by Mr. Meyer.

Q. Could you tell whether this cigar stub was fresh or not?

A. It looked as though it had been smoked.

Q. Recently?

A. Yes sir.

Witness excused. [90]

SAM R. WHITE,

a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Christian.

The WITNESS: My name is Sam R. White; I reside at 720 Nevada Avenue, Butte, and I am a funeral director, proprietor of White's Funeral Home. I have lived in Butte, a little over 45 years. I was acquainted with Walter Gamer in his lifetime and was called to his residence April 10th, of the year 1933. I would say I had been acquainted with Walter Gamer, prior to his death, 12 or 15 years. I might say that acquaintanceship was intimate and I might say it was not. I was very well acquainted with him and very friendly with him. I saw him frequently, met him a number of times in his place of business, Gamer's Confectionery, and met him otherwise socially, fraternally. His general natural disposition was very good any time I saw him, very happy and jovial; he was inclined to be cheerful.

(Testimony of Sam R. White.)

He was setting a job on his friends all the time, joking. I never saw him when he was morose or disheartened. Walter seemed to get considerable enjoyment out of life.

I saw Mr. Gamer a little while before his death; don't know just exactly how long it was; it wasn't very long; a few days. I had a talk with him at that time. As I recall we were riding west on Park Street in my car. I did not notice any change in his disposition and general demeanor on that occasion from what it had been for several years prior, happy and good natured. I have seen Mr. Gamer with his family, that is with his wife. I don't know that I ever saw him and the daughter together. His attitude towards his wife was very nice and they [91] seemed to be devoted to each other, apparently of a happy family life. Mrs. Gamer's attitude toward him was always good.

Mr. Gamer was a man about 5 foot 9, tall and weighed 175 or 80 pounds I should judge. He always seemed healthy. I did not notice any change in his physical condition recently, prior to his death. I never heard him complain of any illness.

I saw the body after death. The body was well nourished and in the same condition as it had been for a long time prior to his death. I conversed with Mr. Gamer on numerous occasions and never heard him speak of any financial difficulties. He always had money to meet his way but I don't know anything about the quantity of it. I never saw him when he was without money to spend.

(Testimony of Sam R. White.)

I don't know whether I could state the exact time that I arrived at the Gamer home April 10, 1933. I had gone home to my lunch and it was possibly 12:30 or a little better than that when I drove up in front of my place of business on West Park Street and I was told to go right over to the Gamer home, that I was wanted and that was between 12:30 and 1:00 o'clock but I can't tell the time to one minute. After arriving at the Gamer home I talked with somebody, I don't recall who, downstairs a moment, and then went upstairs where the body was lying. The stairway led up toward the north, starting right at the front door, about the south side of the house; and at the head of the stairs we turned to the left around to the foot of it, down a little hallway. The body was lying there on the floor in the room, in the bedroom; from the knees down about the feet to the lower limbs were in the closet and the rest of the body was outside the closet door into the room. I observed the closet and there was clothing in it, quite a lot of clothing hanging on [92] either side wall of the closet. It was a closet I would think possibly 3 feet wide and maybe 5 to 6 feet depth, but I don't know exactly as I didn't measure it. The body was clothed. I don't know that I could describe the clothing, but clothes that one would wear around the house or doing chores, or that might be going to the country maybe in. I don't know that I can say directly but it seemed to me that he had a jacket on; I would not be positive. It was not

(Testimony of Sam R. White.)

the type of clothing one would wear going down town to attend to business or socially likely, but sort of fishing clothing or outing clothes. I would not like to say positively that I had seen those clothes before but very likely I had.

I did not see the firearm there and cannot recall whether I saw the upper plate of teeth or not; I don't recall seeing a pair of spectacles. I think I was present when the Coroner went through Mr. Gamer's pockets or had someone do it. I didn't do it and it seems to me that Mr. Hanley went through his pockets and handed over to Mr. Murphy what he found there. They did not find any note or message in his pocket or anywhere else in the house that I know of. I noticed Mr. Gamer's lower teeth right along here at the corner of the mouth; there was a tooth or two teeth, I am not positive which, that apparently were loosened and broken off and sticking out. I don't know whether they were natural teeth or not.

Cross Examination by Mr. Poore.

The WITNESS: I had not visited at the Walter Gamer home; he had never visited at my home. I had been out with him socially other than in lodge work; was out with him and his family [93] socially where gatherings were; it might be a little informal dinner or celebration of New Year's Eve or some occasion of that kind.

(Testimony of Sam R. White.)

As I told you a few moments ago the last time I saw Walter Gamer that I definitely remember, prior to his death, was a few days prior to his death, the number of days I would not say, and cannot say whether it would be as much as a week. I haven't any definite recollection on that. I never went fishing with him nor did I go hunting with him.

I went to the home on this occasion and found his body as I described. I did not make any examination of the body myself at any time further than to note as it lay there with the back of the top of the head toward the crown was badly blown away and the head was lying there in a hat. The back of the head and crown of the head was blown out for some inches in diameter, pretty well here to the top of the crown and in down here at the base; and the lower teeth, some of the lower teeth were protruding, turned upward in the left corner of the mouth. I don't know whether those were natural or false teeth but I think natural. I don't know how many natural teeth he had and I don't know how many false teeth he had. I think there was an upper set of false teeth there but would not be sure. If I did see an upper set of false teeth I can't answer where I saw them, but there in the room. I did not do any work on the body myself; that was done by my two men, one of whom has since died and the other is now working for me. I don't know whether I saw the body disrobed at

(Testimony of Sam R. White.)

any time but I guess I did. I did not examine the face especially after it was washed. I did not make any examination of the face for [94] bullet wounds of any kind; did not make an examination of the face for powder burns of any kind; did not make any examination of the closet for bullet holes, and I did not make an examination of the closet for blood stains or other material in the closet.

At the former trial of this case I testified as follows: "Mr. Gamer had some natural teeth in his lower jaw; that is the one I was speaking of that was protruding out of his mouth, but I wouldn't want to say that positively. There was a tooth sticking out of his mouth, but I don't know whether it was a natural tooth or part of a plate." That is my statement now. I didn't have that committed to memory and I would not try to give verbatim the statement made there. I am trying to remember and tell things as I remember them and as I saw them.

Q. Well now I want to know whether or not you say that this tooth that was sticking out was one of the false teeth or one of the natural teeth?

A. (Addressing reporter) Will you please give my answer?

The COURT: You said you were not certain, you thought it was a natural tooth.

Q. Is that your answer?

A. Yes.

(Testimony of Sam R. White.)

If at my former testimony I said I didn't know whether it was a natural tooth or part of the plate, that is the way I answered just now, that I wasn't certain but I thought it was more than likely the natural tooth.

The gun had been removed when I got there.

Witness excused. [95]

Mr. MEYER: If the court please we now offer in evidence New York Life Insurance Company Policy Number 9692790, being the policy here sued upon.

Mr. POORE: I think it simply encumbers the record; it is pleaded in the complaint and is admitted.

The COURT: It seems to me that is the Policy you allege was executed between the deceased and the company, and the allegation is admitted by answer.

Mr. MEYER: That is correct.

The COURT: If it is received in evidence I think it encumbers the record.

Mr. MEYER: I only offered it because it was received at the last trial without objection.

Mr. POORE: I will withdraw the objection if you want to put it in evidence.

The COURT: It may be admitted.

Document marked plaintiff's Exhibit Number 2:

(NOTE: Exhibit 2 is attached to the complaint as Exhibit A, and will appear in the judgment roll herein, and is here omitted to avoid unnecessary repetition.) [96]

MERLE DAVIS,

a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Meyer.

The WITNESS: My name is Merle Davis. I am in the Real Estate and Insurance Business and have lived in the city of Butte, 40 years. I knew Walter Gamer in his lifetime and had known him about 25 years. For 18 years of that time we were intimately acquainted. During the last 18 years of his life that acquaintanceship was just as intimate as any 2 men can be and their families. Our families exchanged visits. When both families were in town we would visit each other 2 or 3 times a week and at both the houses. In addition to the visits we exchanged at each other's homes, I saw Mr. Gamer practically every day. Mr. Gamer had a dandy disposition, by that I mean a fine disposition; it was cheerful.

I saw Mr. Gamer on Saturday prior to the 10th of April, 1933; saw him on the street and in my apartment and had a conversation with him at that time. He wanted to know if I could go on a trip with him the first part of the week. He didn't say

(Testimony of Merle Davis.)

what kind of a trip; he just said a trip to get out and he said he might get some fish. I told him I was sorry I couldn't make it. At that time his disposition was alright. There was nothing about his conversation or attitude to indicate a change in his disposition. He did not seem despondent or discouraged at that time.

Upon the occasions of my visits to the Gamer home, that home was at 805 West Silver Street in this city. Mr. Gamer's treatment of his wife and daughter was fine. There was one child [97] in the Gamer family, Elsie Jane Gamer. He was devoted to his wife. Mrs. Gamer's treatment to him was just fine, she seemed to be devoted to him. Mr. Gamer and his daughter were pals. She was fond of him. The married life of Mr. and Mrs. Walter Gamer was happy.

I never heard Mr. Gamer complaining of business troubles during the last 6 months of his life. I always thought Mr. Gamer was a very healthy fellow. He never complained of his health to me. I did not see any change in his appearance so far as health was concerned during the last 6 months of his life.

I had gone on fishing trips with Mr. Gamer and at times frequently. We always had guns while going on these trips; he had guns; Mr. Gamer carried a gun with him.

This rifle on the desk in front of me marked plaintiff's Exhibit 1, I have seen before. That belonged

(Testimony of Merle Davis.)

to Walter. I only saw him have that rifle with him once, on one of the fishing trips and I was with him on that occasion. I had seen this rifle in the Gamer home, in the closet, in the front bedroom upstairs.

Q. And this closet that you speak of, where is that closet with reference to the bedroom?

A. Well, the closet runs, you enter the east wall of the bedroom, and runs east.

This rifle was kept in the southeast corner of that wardrobe. Mr. Gamer did not have a case for this rifle. Also in that closet he had a shotgun and the case and he had a cylinder case to cover that fishing pole and had miscellaneous fishing tackle on the floor, and in addition to the rifle standing in the corner he had a casting rod and some old clothes. He also had new clothes but these that I am speaking of were old clothes on the floor, in the back part of the closet and he had some shoes. The guns and [98] fishing paraphernalia were from the southeast corner up across the back of this wardrobe. I saw a pistol in that closet and it was kept on the upper shelf on the north side. That pistol was a 22 Colt's Automatic. I have that pistol now. That pistol was kept on the shelf on the north side of the closet. Mrs. Gamer gave me that pistol about a week or 10 days after Mr. Gamer's death. At the time I received the pistol it was loaded and it had 8 cartridges in the magazine and one in the barrel. I saw the pistol on the day of Mr. Gamer's

(Testimony of Merle Davis.)

death and it was on the same shelf. I happened to see it on that day because I looked up and around in the closet and saw it there. I knew where he usually kept it.

I was at the Gamer home on the day of Mr. Gamer's death and I think I got there about 10 minutes to 12:00. His body had not been removed; his body was there. When I saw his body it was flat on his back with his head towards the west and from the calves of the legs to his feet in the closet and the rest of his body was out in the bedroom. I saw an upper plate there. Mr. Gamer had false teeth. I saw this upper plate on the north side about the calf of his leg; on the north side of the body and as I remember just inside the entrance of the closet. I saw the glasses there and they were alongside the plate, close to the plate and they were broken in the middle, the nosepiece. I don't think either of the lens were broken. I saw this rifle plaintiff's Exhibit 1 there that morning and to describe where it was, Walter's feet were separated I would say about a full foot, the butt of the rifle between his feet and slanted up this way across his body with the barrel pointing west and south, a little south and diagonally west. He did not have a hold of the gun with either hand. His right hand was right up here and his left [99] hand was down here; his left hand was about in this position; the hand would be about the tip of the leg, about his hip. I didn't notice any blood on the gun.

(Testimony of Merle Davis.)

I saw a cigar butt there that time. It was on the window ledge of the window in the closet. The window in the closet is not quite the middle; it is on the right side as you enter the closet facing south; the right side as you enter would be the south side of the closet. The cigar was moist. I did not pick it up but I felt it.

Mr. Gamer bought new clothes shortly before his death, a week or 10 days before, I think; he bought 2 suits and an overcoat and a new hat.

I saw a hat there that day; his head was resting in the hat. I had seen that hat before; saw it on numerous occasions. It was not a hat he wore around town but he always wore it when he went out in the country.

I observed blood in the closet on some clothes hanging there, a smoking jacket, I think it was and some blood on the ceiling. I saw a hole in the ceiling and that was about a foot or a foot and a half back from the door in the ceiling; I mean back from the door east; that was a hole in the ceiling of the closet. I had been in the Gamer home when Mr. Gamer spoke to his daughter about going into this closet.

Q. Can you tell whether that happened once or more than once?

A. He spoke to Elsie Jane—Walter was a quick, fast talker and he sometimes repeated and he said to Elsie Jane oft times when she trailed us up in

(Testimony of Merle Davis.)

the room, "Now leave that closet alone, it is dangerous and no place for you."

I did not find any note or message that day. Mr. Gamer's habits with firearms was careful, but he was jumpy. By jumpy I [100] mean,—this happened one time: Walter had a rifle, I don't think it was this rifle, it may have been but I doubt it and I had a two-barrel gun—well without going into details by jumpy I mean if you would say something to him while he was doing anything he would be liable to start doing that particular thing or to start out on something else, he was very quick motion. Walter Gamer was right handed.

I did not take up this gun case I saw in the closet that day and I don't know whether there was a gun in it or not. Mr. Gamer was right handed but he was pretty good with both hands. I observed how Mr. Gamer was dressed on the morning of April 10th when I saw him. The clothes he wore that morning I had seen before frequently; had seen them on Mr. Gamer many trips when we were out together, fishing trips. I don't do much hunting. I could not give you the exact number of times that I had gone fishing with Mr. Gamer during the last 3 years of his life, but when business conditions would permit with both, we would go fishing and I would say that would be frequently. On most of those occasions he wore the clothes he had on at the time of his death.

(Testimony of Merle Davis.)

Cross Examination by Mr. Poore.

The WITNESS: I went up and saw the body of Mr. Gamer twice while lying on the floor of the bedroom and looked all through the closet. I did not move the body or anything before the Coroner arrived and neither did anybody else to my knowledge. On that occasion I saw clothing hanging on hangers in the back of the closet, that is the east end of the closet; those clothes were hanging on hangers. On the north wall of the closet there were some on hooks, a few clothes hanging there. On the south [101] wall of the closet I think 4 hooks but I can't say that clothes was hanging on them; I don't think there was very much hanging on that wall, very little. I also noticed in the closet a box of shoes and I think that was on the shelf on the north side of the closet. That shelf was quite a ways up from the floor, you would have to reach up; I think it would be above your head and these things were out to the edge of the shelf; I think they were above your head on the shelf. I also found the pistol in that closet. The pistol was up there close to the edge. That was a Colt 22, a long barrel; it was a 22 Colt's Automatic and it is loaded through the magazine. I saw the gun there that day but didn't notice then whether it was loaded or not but a week or 10 days later I noticed it was loaded and at that time I took it off the shelf myself; off that same shelf and noticed then it was loaded and put it, when I took it off the shelf, with some other

(Testimony of Merle Davis.)

stuff in the front bedroom. I took the magazine out and took the shells out and checked it from the barrel; emptied the magazine. I also saw a shotgun case in that closet. I didn't open it. It was standing on the larger end of the case up; it was standing up in the corner of the closet with the open end of the case down, the end you take off to remove the gun, that was down. That was standing in the southeast corner of the closet. It was what you call a take down leather shotgun case. I think that would be approximately 2½ or 2 feet in length, or something like that; not a very long case. In the closet I also saw some miscellaneous fishing tackle and reel I noticed on the floor and cylinder fishing pole and container in the same corner and robe in the corner on the floor, none hanging up. There was order and disorder there. The robe was in the southeast corner, up across the corner and the guncase was in the southeast corner. The robe [102] was in the east corner of the closet. There were also some old clothes in the closet on the floor and they consisted of a pair of pants, and some socks, heavy coarse socks and a heavy pair of shoes in the end of this closet, just tossed in, miscellaneous stuff. That was all in the east end and extending out towards the front, clothes taken off and kicked back there, lying loosely on the floor, not hanging up; lying fairly loosely on the floor. This was the condition of the closet at the time Mr. Gamer's body was lying on the floor in the bedroom.

(Testimony of Merle Davis.)

I didn't particularly make any examination of the body to determine the wounds in the body. I knew he was terribly hurt; it looked like all the stuff was coming from the back of his head. From his nose up there wasn't a mark as I remember. There was some blood across his chin.

Q. Did you at any time make a close examination of his face for bullet wounds?

A. I thought the bullet wound was here.

Q. Did you make an examination?

A. I looked. I am not a doctor or coroner.

I did not lift his head or wash his face or make an examination of that kind. I bent over a couple of times and saw the body lying on the floor and stepped across the body. I made no further examination of his body or face.

I last saw him alive on Saturday evening preceding this Monday, which would be the 8th. I saw him on the street and in my apartment in the Pennsylvania Building. At that time he wanted to know if I would go fishing with him the first part of the following week. There were 2 or 3 that Walter was always after to go with him. I mean there were 2 or 3 friends that he was kind of an inviter and wanted to get away. In other words [103] he called us his spares and if one couldn't go he would take it up with the other. In 1933 the fishing season opened in April. I know you could get fish if you wanted to. The Madison was open on April the 10th, as also were some points above the Ruby,

(Testimony of Merle Davis.)

around in some of the old diggings and lakes back of Virginia, you could fish there. I don't know that they would be frozen solid.

I saw Mr. Gamer take this rifle on a fishing trip just once and that was the only time. I saw him take a rifle another time. One time he had a 25-20 rifle. He used to borrow rifles often, or loan them, but the only rifle he had on the 10th of April, 1933, and for some time prior thereto was this rifle here. I couldn't say definitely the year he got this rifle, but he had it some time; I couldn't say definitely he had it.

I thought more of him than I could of my own brother and he had been my dearest friend for a great many years. It was a great shock to me. I was not particularly excited. I get nervous sometimes but don't get excited easily; I don't think I do. I might have been a little nervous on that occasion.

Re-Direct Examination by Mr. Meyer.

The WITNESS: I know of Mr. Gamer having some puttees or leggings which he had some time ago. He never used them in late years for fishing. He used them for horseback riding and hunting trips. I recall him having some khaki pants which he used for fishing. Those were not the pants he had on the morning of his death. On the morning of his death he had on dark heavy trousers which I think had a stripe. I had seen them before. He

(Testimony of Merle Davis.)

had a complete suit of it once. I don't know whether the [104] jacket he had on is commonly known as a blazer or not. It was a loud color, loud plaid and I think it buttoned close around the neck.

I recognize plaintiff's Exhibit 3 for identification which is a photograph. I recognize the clothes worn by Mr. Gamer in that picture; I know the jacket and I know that hat which I have seen many times. I don't believe I would swear that was the hat he had on that day; these were the khaki trousers he had on. That is the jacket he had on the morning of April the 10th. I don't know where this photograph was taken. I have had it in my possession 2 or 3 years I guess.

There was a difference in the wearing apparel worn by Mr. Gamer when he went fishing in the Summer and when he went fishing in the Winter. He would often times take this jacket along with him, but he wore lighter clothing in the Summer.

Witness Excused.

Mr. MEYER: If the court please the

DEPOSITION OF P. E. GEAGAN,

a witness who was compelled to leave town before the trial was taken by stipulation of the respective parties. We now offer in evidence the deposition of Mr. Geagan.

(Deposition of P. E. Geagan.)

The COURT: Any objection.

Mr. POORE: No Your Honor.

The COURT: It will be admitted.

Mr. MEYER: The deposition of Mr. Geagan is as follows: leaving out the formal parts. (Reading) P. E. Geagan, having been first duly sworn, testified as follows: [105]

Direct Examination by William Meyer.

The WITNESS: My name is P. E. Geagan. I am a lawyer. I first came to Butte, on the 24th of April, 1901. I have been away from Butte, at different times for as high as 3 years at one time up until 1908, when I returned to Butte, and have resided here ever since continuously except for business trips, and one thing and another. I have been a practicing attorney in Silver Bow County, 25 years. During my residence in the city, I was acquainted with E. Walter Gamer or Walter Gamer in his lifetime. To say when I first met Walter Gamer is rather an uncertainty, but I knew him quite intimately from 1916 on until the time of his death. The nature of that acquaintance was friendly and social, hunting, fishing, visiting back and forth. By visiting back and forth I mean I visited his home and he and his family visited my home. I was well acquainted with Mrs. Gamer and Elsie Jane, the daughter. I could not give Mr. Gamer's exact height; I would say about 5 feet 10 inches in height or maybe 5 feet 11 inches and a man I would say who would weigh close to 180 or 190 pounds.

(Deposition of P. E. Geagan.)

During my acquaintance with Mr. Gamer, and particularly during the later years of his life, when in Butte, I would see him practically every other day, and I would meet him on the street or in his place of business or in some other way while we were both in town. I have gone hunting and fishing with him many times. From my acquaintance with him and my association with him I had opportunity to observe his disposition and manners. He was of a very cheerful disposition, and what we often term among ourselves as a man who is the life of the party [106] when we were together. He was a man who seemed to enjoy life very much.

I last saw Mr. Gamer alive I would say about 5:30 or 6:00 o'clock on the Sunday evening preceding his death. If his death took place on April 10th, 1933, then the last time I saw him was on the evening of the 9th of April, 1933. Immediately prior to April 9, 1933, I saw him last the Saturday preceding, which would be the 8th. I saw him Saturday night, April 8th at a little family social group of cards. That was a card club of which I and Mrs. Geagan were members and Mr. and Mrs. Gamer were members. On that Saturday night I was in the company of Mr. Gamer I would say from 7:00 o'clock in the evening until probably 1:00 or 1:30 Sunday morning. During that period of time I had occasion to observe Mr. Gamer's actions; played cards with him and the other members of the group;

(Testimony of Merle Davis.)

also had dinner with him and his wife before the playing of cards begun. I did not observe any change in his disposition at that time from what it had been during the preceding several years. There wasn't anything whatever during those few hours we were together on that Saturday night that indicated to me in any way that Mr. Gamer was despondent and discouraged. He was cheerful.

During the times I saw Mr. Gamer in the company of his wife and daughter they appeared to be a very happy family, and he particularly seemed to have his greatest happiness with his family. He seemed to be very much devoted to his wife and child. They seemed to be devoted to him.

I believe I had many occasions to observe whether or not he was attached to his daughter. I would say he was very much. I observed Elsie Jane's demeanor toward her dad. She seemed to have a great deal of love and affection for her father. [107]

As far as I could observe from my acquaintance with Mr. Gamer I did not see any change in his condition of health during his later years of life. I never heard him complain of bad health or being sick, except I would not say I never did hear. He might have complained about a cold or something of that sort. I do not remember of ever hearing Walter complain of his health.

When I did go hunting and fishing with him Walter always held up his end and was always full of life, energy, wanting to keep things going and hav-

(Deposition of P. E. Geagan.)

ing a good time. I never heard him complain of any financial difficulties during the later months of his life. I did not know of any financial difficulties he had.

When I went with him on fishing trips I know whether he took a gun. I have no memory of the time we were together that either he or some member of the party did not have a gun or maybe more than one gun. I have seen the 300 Savage Rifle that Mr. Gamer owned. I have *seen have* it with him when we went on fishing trips. Once I can recall the rifle. It was the same rifle. I saw the rifle before his death and I also saw it after his death. I saw it in his home and I saw it in the courtroom of the Circuit Court of Appeals in San Francisco. That is the rifle I remember he had with him on one occasion when we were fishing; that was over on the Ruby.

On Sunday afternoon April 9th, I first met Mr. Gamer in Walker's on West Park Street, Walker's Saloon, Beer Parlor, whatever they call it. I would say possibly the first time I saw him that afternoon was between 4:00 and 4:30, because I left my office about 4:00 o'clock to go home and it was after leaving my office that I met him there. I was with him in Walker's possibly 3/4 of an hour. While there we had 2 glasses [108] of beer. That is the first time I remember that beer was sold legally and openly in Butte, after prohibition. I conversed with Mr. Gamer that afternoon; his disposition seemed

(Deposition of P. E. Geagan.)

fine, friendly. He seemed to be in a very cheerful state of mind, happy frame of mind. He particularly seemed to be burdened with the idea of inducing me as he had the Saturday evening before, of going on a fishing trip for a couple of days on the Madison. He spoke about the lake and the fact I had a motor there and things of that sort, and it would do me good as well as himself probably to have a couple of days outing. He asked me to go fishing with him Monday. He told me he was going fishing on Monday; he told me he was going to meet a Mr. Buford from Bozeman. I couldn't say how many times he asked me during his conversation with me on that afternoon to go fishing with him Monday morning. He was rather quite insistent on me going with him and he talked with me a great deal about it while we were standing in Walker's, and he even after we left there he continued to speak about the good time we would have, until we parted in front of the Montana Hardware, which was the last place I saw him, and he seemed to think we would both have a good time if I would only go along. He told me definitely he was going fishing that Monday morning. I did not see any change in his apparent condition of health that evening. He did not make any complaint about not feeling well. His disposition that afternoon was no different from what I have already testified his usual disposition was.

(Deposition of P. E. Geagan.)

Cross Examination by W. D. Kyle.

The WITNESS: During my acquaintance with Mr. Walter Gamer he was engaged in the Candy and Restaurant Business. The name of [109] that business was Gamer's and I believe the word "confectionery" but I have always referred to it as Gamer's. It was located at the corner of Montana and Park Streets in Butte, Montana, until the fire. I cannot tell exactly when that fire occurred. I used to eat there often and this little group of ours used to go there Saturday evenings until that happened and then we went to the Silver Bow Club and that happened before Mr. Gamer's death, because the evening of the Saturday preceding his death, I believe, we all had dinner at the Silver Bow Club and drove from there to the home of the party. I could not tell you approximately how long prior to April 10, 1933, when he died, that this fire occurred; it was some months prior to that; I could not say just when. I would say approximately in the month of October, 1932; along in the Fall of 1932, or the early portion of the Winter, I don't know which. I could not tell you the effect of that fire upon this place of business; could not tell whether it was a partial loss or a total loss. I was never in until the new building was fixed last year, or the year before. The business thereafter to my knowledge was not conducted at this place of business the corner of Park and Montana Streets. I do not believe there was any business conducted by him after that fire.

(Deposition of P. E. Geagan.)

I do not know who he was associated with in that business. Mrs. J. Fred Gamer used to be there quite frequently and I have met also Fred Gamer, her husband, there from time to time.

Following the destruction of this place of business of Gamer Confectionery Company, Walter thereafter and prior to his death was not engaged in any business to my knowledge. I know he was looking about concerning business locations, suitable or adaptable places for such business as he had been engaged in. He at least discussed such matters with me. From the time of [110] the destruction of the Gamer Confectionery in this city in the Fall of 1932, until up to the time of his death in April, 1933, he was not engaged in the line of business he had been engaged in. I would not say whether he was in any other line of business. I do not know what his interests were outside of that, but so far as my knowledge is concerned I would say not.

Walter was what we considered a fair game shot for big game and birds. He had used firearms and especially rifles. He had used rifle, shotgun, and pistols to my knowledge for fully 16 or 17 years. It was my observation that Mr. Gamer was careful in the handling of firearms; I always considered Mr. Gamer careful. We were not always sure of the mechanisms of our artillery.

The last time I saw Walter was on the preceding evening of the day he died. The meeting started at Walker's place of business on West Park Street of

(Deposition of P. E. Geagan.)

this city and it terminated in front of the Montana Hardware when I went across the street to Kilvanick's to purchase some street car tokens and cigarettes.

Q. At this meeting in Walker's he sought to induce you to accompany him on a fishing trip?

A. He had already spoken to me about the fishing trip on the Saturday evening previous.

He indicated he proposed to go over to the Madison on this fishing trip. I did not make any agreement with him to go on such a fishing trip the next day. The last thing I told him was if I decided to go I would call him up and not having gone I did not call him up. I had no conversation with Walter Gamer on the day of his death. At this meeting in Walker's he told me that if I would go along, he said, "If you go along I will come over and pick you up about 8:00 o'clock." I did not decide to go. [111] When I discussed it with my wife and thought of my own affairs that night I was rather inclined along this line but decided to the contrary on account of my own affairs. I did not so advise Walter of my decision not to accompany him on this trip because I had told him if I decided to go I would call him up and tell him so. I was in Butte, on the day of his death and was out to the house after his death. Was not out to the house before his death.

Redirect Examination by William Meyer.

The WITNESS: We were going to the Madison Lake, what we term the Madison Lake. It is the

(Deposition of P. E. Geagan.)

lake above the lower dam at Meadow Creek, in that way below Ennis, between Ennis and the dam. You turn off from McAllister's Post Office to go down along the lake where you can go in from several other places to fish. I had fished there before many years. Mr. Gamer said if I decided to go and would call him, he would pick me up.

Witness Excused. [112]

MRS. STELLA J. GAMER,

plaintiff herein, called as a witness in her own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Meyer.

The WITNESS: My name is Stella J. Gamer; I am the widow of Walter Gamer. We were married in Butte, Montana, in 1908, July 7. Prior to Mr. Gamer's death, he and I resided at 805 West Silver Street and had resided there about 8 or 9 years. We owned our own home. We have one child and her name is Elsie Jane. She is now 13 years old and she was 11 years old at the time of her father's death. Elsie Jane was living with us at the time of Mr. Gamer's death. Mr. Gamer was always cheerful, happy and jolly. I never knew him to be despondent or discouraged. He was a man who seemed to enjoy life.

The Gamer Confectionery Store was destroyed by fire in October, 1932. From the time of the fire up

(Testimony of Stella J. Gamer.)

to the time of Mr. Gamer's death I did not observe any change in his disposition. I think Mr. Gamer was devoted to me. Our married life was happy. I was devoted to him. He loved Elsie Jane; they were pals. Elsie Jane's feelings towards her father were just the same.

I never heard Mr. Gamer complain of any financial difficulties and as far as I know he had none. His condition of health was very good. I never knew him to complain of being ill, nothing more than a cold sometimes and that condition was true up to the time of his death.

I arose first on the morning of April 10, 1933, and I was first downstairs, getting down about 9:00 o'clock. Our home is a two-story building and the bedroom was upstairs. On the first floor were the kitchen, dining room and living room. I stated that I got downstairs about 9:00 o'clock. Elsie Jane was not [113] going to school then as it was Easter vacation. She was attending school but that week was Easter vacation.

Mr. Gamer got downstairs about half an hour or so later than I did. I could hear the water running in the bath tub prior to his coming downstairs. He came down about a half an hour after I was down there. Elsie Jane was down with me. When Mr. Gamer came downstairs that morning and came out in the kitchen he said, "I think I'll go fishing." He was dressed in his fishing clothes. I had seen him wear those clothes frequently prior to that time

(Testimony of Stella J. Gamer.)

when he was going fishing. When he came down that morning he did not have a hat on his head; he did not have a hat in his hand, I didn't see it and if he had one I would have seen it.

I prepared his breakfast and engaged in conversation with Mr. Gamer as usual. Elsie Jane engaged him in conversation. As far as I was able to observe I did not observe any change in his attitude or disposition that morning. It was the same as it ordinarily and usually was. It was just the same during the entire conversation I had with him both before and during and after breakfast. Elsie Jane and myself ate breakfast with Mr. Gamer that morning and that was customary. For breakfast that morning Mr. Gamer had some fruit and 2 eggs and 2 cups of coffee and 2 pieces of toast and that was just about the same breakfast he usually ate. I served Mr. Gamer's breakfast. After serving him his second cup of coffee I did not remain with him in the kitchen but I left him and Elsie Jane and went down to do the washing. The door leading into the basement was opened. After I went downstairs I heard Mr. Gamer and Elsie Jane. Elsie Jane was washing the dishes and he was drying them; I heard them in conversation, they were talking and laughing upstairs. Walter [114] was joshing Elsie Jane. They were engaged in washing and drying the dishes 20 minutes or a half an hour or something like that and then Elsie Jane came down in the basement where I was and Mr. Gamer went

(Testimony of Stella J. Gamer.)

in the front room to read the morning paper. That was his usual habit and custom. I, in the basement, could hear him walking and I heard him going upstairs that morning and I guess that was about a half an hour after I had heard Mr. Gamer going in the front room. The reason I could hear him going upstairs was because the washtubs are right under the stairs going up; the wash tub where I was working was right directly underneath the stairs. I never saw Mr. Gamer alive after I served him his second cup of coffee.

I was called to the phone that morning and spoke to Mr. Gillis over the phone. He wanted to speak to Mr. Gamer and I started looking for Mr. Gamer; I started to go to the garage and Elsie Jane ran upstairs. I heard Elsie Jane scream and I came back to see what was the matter. I went upstairs and saw Mr. Gamer's body. I could not describe how his body was laying. I then ran downstairs and called for help.

The gun, plaintiff's Exhibit 1, the rifle I have seen before, just looked at it, just like it; and saw it at home. Mr. Gamer owned a rifle of that kind and he kept it in the closet upstairs; I mean the closet leading off the bedroom. He also kept in that closet a shotgun and his fishing outfit and his own clothes, his own closet. It was his closet and it was used exclusively by Mr. Gamer. Mr. Gamer never had a case for this rifle that I knew. He owned a shotgun and he had a case for that. That was kept in the closet.

(Testimony of Stella J. Gamer.)

He also had a pistol in that closet and it was kept on the shelf, which is the shelf to the left as you enter the closet. I had seen that pistol [115] there prior to April 10th. He told me it was loaded. He told me that because he would go away and leave Elsie Jane and me alone so much and he said he left it there for protection; said he left it there for our protection. I gave that pistol to Mr. Davis about a week or 10 days after Mr. Gamer's death. When I gave it to him it was on that shelf. As far as I know it had not been disturbed from the time it was put there by Mr. Gamer until I gave it to Mr. Davis. I heard Mr. Cummings testify this morning he put the pistol in the other closet. He was mistaken. He put the shotgun in the other closet. I heard Mr. Gamer warn Elsie Jane about going into this closet. He told her not to go in there because he had guns in there. I just cannot tell how many times I heard that but several times, more than once. I never permitted Elsie Jane to go in there.

Walter was a man who enjoyed hunting and fishing and went every time he had a chance. Sometimes when he would go on these fishing trips, he would come home from work and get ready and go in 15 minutes and other occasions he would notify me ahead. It was not unusual on this morning that he told me this morning he expected to go fishing. When Walter went fishing I have seen him take a gun.

I recall Mr. Gamer buying some new clothes before his death, and I should judge he purchased

(Testimony of Stella J. Gamer.)

them a week or 10 days. He bought 2 suits and an overcoat.

This closet was crowded. I had went in there occasionally. It was very difficult to move around in the closet, he had so many things.

I did not find any note or message from Mr. Gamer. In any of his actions or conduct or demeanor on the morning of April 10th, while I was in his company I did not see anything to excite [116] my suspicion. There was nothing about his actions or conduct to indicate something other than his normal action. He did not seem to be despondent. He had not at any time within my knowledge been despondent that I know of. During the last 2 or 3 months prior to his death he was not despondent or discourged as far as I could see. He was anxious to get in business and other than that I did not observe anything about his conduct. He never complained to me about financial difficulties.

Mr. Gamer had a set of upper false teeth. The fishing clothes that Mr. Gamer wore on this morning were clothing I had seen him wear frequently, many times, and this jacket, and I have seen him wear the khaki pants in the Summer time when fishing. Other than that there was no change in his clothes, shirt or anything that I know of.

Walter was buried in Helena, in the family plot. I am now living in Billings, with my daughter.

(Testimony of Stella J. Gamer.)

Cross Examination by Mr. Poore.

The WITNESS: I am not sure what day he was buried but I think it was the 12th.

Witness Excused.

Mr. MEYER: Plaintiff rests Your Honor.

The COURT: Defendant's witness. [117]

WALTER ARNOLD,

a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Walter Arnold. I am an architect and have been practicing in Butte, for 20 years. I at one time made a map of the bedroom and closet of the Gamer home and have that map with me. It has now been marked defendant's Exhibit 3 for identification and is the map which I prepared on October 31, 1933. I made the measurements of those rooms on the same date. This map shows 1 large room at the bottom of the map and that is the bedroom on the south front second floor. The map shows the entrance to that bedroom in the left inside of the map. That is the entrance to the bedroom. Just above this bedroom on the map is shown the clothes closet. That clothes closet north and south has a width of 2 feet

(Testimony of Walter Arnold.)

3½ inches; east and west it has a length of 5 feet 10½ inches. The door entering the closet is 23¾ inches wide. The ceiling from the floor of the closet is 8 feet 9⅜ inches high. There is shown a window in the closet and it is 2 feet 3½ inches from the trim on the door entering the closet to the edge of the window; it is one foot 11 inches from the east end of the closet to the trim of the window. I think that window opens out onto a little roof over the entrance porch. It opens out to the daylight. The scale of this map is 1 inch to a foot.

There is a pole what I have referred to as a rod in that closet, or have referred to as a hanger rod, underneath the shelf. That shelf in the closet is 2 feet 6¼ inches from the ceiling and [118] it is 6 feet 4, high from the floor. The rod extends beneath that shelf; the rod extends east and west underneath that shelf—no, north and south underneath the shelf, so that clothes hangers may be attached to the rod. There are clothes hooks along the north side of that closet; there are 9, but I have not indicated exactly how far apart they were; they were about even distance apart and about 6 feet 2 inches from the floor. There is a 10 inch shelf extending along the north side of that closet. I have not got it definitely how high it is from the floor, but my memory is it is the same height as the other one, as the shelf to the east. There are 4 clothes hooks on the south side of that closet and on the west side of the window, which is just as you enter the closet.

(Testimony of Walter Arnold.)

I did not see any bullet holes in the ceiling of that closet or make any examination of it at that time; it was not found at that time.

On the upper north east corner of this map I have a further diagram and that diagram is the elevation of the south wall of the closet.

East and west the bedroom was 13 feet 10½ inches; north and south 12 feet 7 inches, the dimensions of the bedroom.

Map received in evidence without objection and marked defendant's Exhibit 3.

Cross Examination by Mr. Meyer.

The WITNESS: I made this map October 31, 1933, the date I have on it. What changes took place with reference to these hooks from the time Mr. Gamer died on April 10, 1933 until that time I have no knowledge. This closet is 2 feet 3½ inches from north to south, [119] the width of it and its length is 5 feet 10½ inches. I have now shown on the table at which you are sitting the width of that clothes closet, 27½ inches; and have shown the length of that clothes closet also upon the table, 5 feet 10½ inches. From the end of this table to the chalk line which I have designated is the width of that closet and to the chalk line at the end of that table is the length.

Redirect Examination by Mr. Poore.

The WITNESS: The length of the entire gun which I have now measured is 43¼ inches and the length from the trigger to the end of the barrel is 30¼ inches.

(Testimony of Walter Arnold.)

Recross Examination by Mr. Meyer.

The WITNESS: Measuring from the trigger to the lower end is 13 inches.

Witness Excused. [120]

E. F. JORDON,

a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is E. F. Jordon. I am an embalmer and am employed at the Sam R. White Mortuary and have been employed there about 15 years last past. On the day of April 10, 1933, I was working for Sam R. White and on that day received a call to go to the Walter Gamer home, 805 West Silver Street in this city and I went. Mr. E. V. Hanley, who is now deceased, accompanied me. When I arrived at the home of Mr. Gamer I remember of seeing Dr. McHaffey, Alex Anderson, Malcolm Gillis and I believe Mr. White and the Coroner. I wouldn't say they were all there when I arrived. I know that Mr. White and the Coroner and Dr. McHaffey were there. When we arrived at the home we took our receptacle that we remove the dead with, took it upstairs and went in the bedroom which is west of the staircase there and placed the body on the cot and prepared to

(Testimony of E. F. Jordon.)

move it to the mortuary. Before we removed the body, or moved it at all, the position the body was lying in, when I saw it, from about the calves of the legs to the feet was in the closet and the remainder of the body was in the bedroom. I wouldn't say exactly it was extending east and west, it may have been a little off. I noticed the gun there at that time. At the time I saw the gun Coroner Murphy had it; that was when I first saw it. I did not examine the body there at the home. I then removed it to the mortuary.

When we removed it to the mortuary we placed it on the preparing table and removed all the clothing and, as in all cases, we sponged the body, cleaned it all. There may have been some [121] blood on the face of the body. We washed the face.

Q. Now after you had thus cleansed the body, what wounds did you see on the face, if any?

A. On the upper lip, extending in about 1/8 of an inch from the corner of the mouth, running upwardly in the lip was a tear I would say.

That tear was about a half an inch long and it was on the left upper lip. It commenced about 1/8 of an inch from the corner of the mouth and extended upwardly toward the nose about half an inch. On the inside of the lip it was tore through with the exception of being held together with a little muscular fiber; otherwise it was all the way through; it was held together in the center of it by a muscular fiber. I assisted in sewing that lip. The edges

(Testimony of E. F. Jordon.)

came together perfectly. There was no part of that lip missing. I saw no other wound upon the outside face of the body of Walter Gamer.

Walter Gamer had no natural upper teeth. The plate of the teeth may have been handed to Mr. White or some person representing The White Mortuary at the home, but I didn't see the teeth until we arrived at the Mortuary; there is where I saw the teeth. When we prepared the body for burial we placed them in the upper portion of the mouth and they fitted perfectly. There was no portion of the gum torn; had the gum been torn we would not be able to put the teeth in naturally. There was no part of the upper part of the gum torn. These upper teeth were not broken in any way. In the lower jaw Walter Gamer had probably 5 or 6 front teeth in the front of the lower jaw. On the lower jaw he also had some bridge work on either side that was braced to those natural teeth; he had bridge work on either side of the lower jaw braced to the natural teeth with a metal strap that held them to the natural teeth. The bridge work was strapped together with these [122] straps and put in so it would fit on the natural teeth. There was a strap in the back of the natural teeth and hooked on each tooth on the side and held them in place; fitted on natural teeth on either side and then there was a strap across from one side to the other, from one bridge to the other in back of the natural teeth.

(Testimony of E. F. Jordon.)

When I first saw this body the condition of this bridgework was such that the bridge had turned upside down and a portion of it was protruding out of the mouth,—I wouldn't say which side now.I noticed that at the home and also noticed it at the mortuary.

There was no wound or laceration on the lower gum. I would not want to state, I don't remember whether any portion or part of the lower teeth either natural or false were missing. There was no part of it broken; the bridge work was turned out. I replaced that bridge work in his mouth and it fitted perfectly. There was no wound in either upper or lower lip other than the one on the left side of the lip which was held together by muscular tissue. There was no wound in any other part of the face other than this tear on the left upper lip; there was no wound in the nostrils; there was no wound in either eye; there was no wound in either ear; there was no wound in the chin. There was no wound in the front or on either side of the head; there was no wound under the chin.

In the back of the head about 2 inches above the neck there was an opening about 3½ inches in diameter; in other words that back part of the head was blown out and had a diameter of 3½ inches. In dressing and preparing the body for burial it required a filler for the back part of the head, a cone sh ped filler. In other words it was necessary to place a filler in the [123] back of his head 3½ inches to fill the cavity caused by the back of the

(Testimony of E. F. Jordon.)

head being blown out. There was no other exterior wound on the body of Walter Gamer that was visible to me except the one on his left lip and the wound in the back of his head. There were no powder marks upon his face. We examined his face for powder marks when we prepared his face. If there had been powder marks on his face they could not have been washed off.

Mr. Hanley did the sewing of this wound that was in the lip prior to the time he was buried and I assisted him; he sewed it in my presence. That wound fitted together perfectly. There wasn't any missing flesh or material of any kind.

There were some fractures on the lower jaw, right side; there was one fairly well up on the right jaw and one in the center and there was a smaller one in between those two; there were 3 in all. The right lower jaw of Mr. Gamer was broken in 3 places; one point near the chin; one point on the upper part of the jaw near the ear, and the other point about midway between. That was fractured; those were fractures of the bone. There was no outside wound upon the jaw that I could see visibly; they were not compound fractures as far as I could see; they were not visible.

Cross Examination by Mr. Meyer.

The WITNESS: I would not say what caused these fractures. A fall could cause them.

Witness Excused. [124]

DR. GEORGE J. McHAFFEY,

a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is George J. McHaffey. I am a physician and have been a physician five and one-half years. My office is at the Murray Hospital Clinic and have been engaged there five and one-half years. On April 10th of the year 1933 I was called to 805 West Silver Street and arrived at the home about 10 minutes to 12:00. When I arrived at the home Mrs. Gamer, her daughter, Miss Christian and some other woman whose name I don't know were there. No other man had arrived before I did that I know of. When I arrived I went upstairs, followed Miss Christian upstairs to the bedroom and that was the bedroom in which Walter Gamer's body was found. When I arrived in the bedroom I saw the body of Mr. Gamer lying on the floor. It was lying with the body out in the bedroom and the lower extremities were extended into a small closet for a distance of about 12 inches. The body was lying on its back. I observed a gun there at that time. This rifle plaintiff's Exhibit 1 appears to be the gun I saw there at the time; it was either it or one that looked like it. The stock of the gun was between the feet of Mr. Gamer and he was holding the barrel of the gun in his left hand. The left hand was just slightly above the crotch, clutching the barrel of the rifle. The left

(Testimony of Dr. George J. McHaffey.)

hand was just above his crotch about in here. I am laying my hand on my body about a little below the navel, and in that hand he held the barrel of this gun. The hand was held just about an inch or two from the muzzle. The [125] stock of the gun was between his feet. His right hand was across the chest.

I made an examination of the body at that time before the Coroner arrived. I picked up the hand and partially turned the body over so I could see the wound in the back of the head and that purpose was to see whether or not life was entirely extinct. In the back of the head I found a large wound, all bone and soft tissue in the back part of the head blown right out, about 3 to 4 inches in diameter and the cerebral hemispheres were protruding through this hole. The portion of the head blown out was the occipital area. I did not move the gun in any way and I did not otherwise disturb the body in any way.

I then went downstairs and into the kitchen and talked to Mrs. Gamer. After a few minutes I went back in the hall and tried to get the Coroner and called several numbers and finally located him. I waited for the Coroner. I was there when Mr. Gillis came and was there when the Coroner came and was there when other gentlemen arrived. I went up to the room afterwards and several went with me; the Coroner. At this time when I went in the room I just looked at the face of the deceased. I

(Testimony of Dr. George J. McHaffey.)

saw a laceration on the left upper lip of the deceased. The examination I made of that laceration was just inspection only. From that inspection I would say the laceration was a clean laceration of the upper lip on the left side; a laceration or tear; tear might be a better term. There was no part of that lip missing that I could see, none whatever. I did not make any examination of the interior of the mouth. I did not see any other wound in the face or front part of the head of the deceased. If there had been such a wound I think I would have noticed it. I made sufficient examination for that purpose. [126]

I examined the closet and saw a hole through the ceiling. That hole in the ceiling was midway between the north and south wall and about one foot in from the door, I would say; that would be about one foot east of the door entering into the closet. That was a plastered ceiling. I would judge the size of that hole to be about the size of a 25 cent piece. I saw blood or matter about that hole; it was splattered here and there, blood and tissue all over on the entire closet, ceiling, walls, clothes and floor; not as far over as the western end of the closet, just in the vicinity of the door.

I noticed a cigar butt there and that was in the window sill of the closet. I noticed false teeth and they were in the far end of the closet; the east end. I picked them up. I noticed glasses there and they were beside the teeth. I picked those up also. I be-

(Testimony of Dr. George J. McHaffey.)

lieve I gave the false teeth to Mr. White or Coroner, either one, I am not sure. It was an upper set of false teeth. I am not prepared to say what composition they were. The false teeth didn't seem to be broken in any way. I believe the glasses were broken through the nose piece. I am not sure what kind of glasses they were but I believe they were horn rim.

Walter Gamer was dead probably 10 minutes when I first arrived. I did not see any other bullet hole in the closet than the one I described. There was clothing in the clothes closet and that was along the north wall and the east wall. I don't believe there was any clothing hanging on the south wall, if there was very few articles; I don't believe there was any hanging there at all. There was clothing on the floor; I don't know just what it was. There were some shoes in the closet in the far end. I saw a gun case in the closet and it was on the right [127] wall, that is the south wall of the closet near the door, on the south wall of the closet near the entrance to the clothes closet. It looked like a leather gun case. It was leaning against the wall. The open end was down, that is the end which you open. When I first saw it there that end was open. I did not examine it to see whether there was a gun in it and don't know whether there was a gun in it. I did not see any other gun in the closet. I could see to the end of the closet by standing at the door. I did not notice any fishing tackle in the eastern end of the closet.

(Testimony of Dr. George J. McHaffey.)

There were no powder burns upon the face of the deceased.

Cross Examination by Mr. Meyer.

The WITNESS: The face was not covered with blood; there was no blood on the face that I recall; I don't believe there was. My recollection of the incidents that happened there on the morning of April 10th, is clear at this time. There was no blood on any part of the face of Mr. Gamer that I recall. I examined the face for powder burns, just the face. I did not observe or notice any fishing tackle in the closet. I did not see clear through the closet. I did not see everything that was in the closet on the morning of April 10th. I did not say there was no fishing tackle in there; I said I didn't see any. I was not looking for any. As a matter of fact my interest was absolutely in the patient. When I testified as to the position of the gun and what I didn't see there I mean that from my observation I didn't see these things. My memory is clear as to the gun case. It was right inside the door of that closet on the south side. [128]

I did not see any shoes there; they were on the farther end, I saw the shoes. I looked at the shelf to the north and did not see a gun there. I wouldn't say there wasn't any there.

I found this upper plate of teeth at the far end of the closet. That is the only plate that was there. When I say the far end I mean the east end. It

(Testimony of Dr. George J. McHaffey.)

was among the shoes at the far end of the closet. I saw the pole there and that is a pole some clothes were hanging on. The plate was to the right of the clothes, underneath the clothes, directly underneath. The glasses were right with the teeth, right beside it. I did not examine the plate, just picked it up and handed it to somebody.

I was the first man there as far as I know. I don't think anything was disturbed in that closet from the time I got there until the Coroner arrived. I saw Mr. Merle Davis there; saw Malcolm Gillis there; saw them upstairs. I don't think anything in that closet was disturbed from the time I got there until they got there. I also saw Mr. Cummings there. Nothing was disturbed when he got there. When I lifted up the head of Mr. Gamer that did not disturb the gun, didn't move the body; it didn't move the body, picking up the head. I didn't move the body at any time.

The condition and position of the gun and body, the position of the body and gun at all times I was there was undisturbed until it was removed by the undertaker. I saw the cigar butt there. It was on the window sill. I did not examine it. It was not smoking when I got there. I may have called Mr. Davis' attention to the cigar butt and I may have told him when I got there it was smoking. If I told him that it was smoking when I got there it is a fact but I don't remember now whether I did or not. When I got to the house Mr. Gamer's body was still warm. I [129] believe I remember how

(Testimony of Dr. George J. McHaffey.)

Mr. Gamer was dressed. He had on a dark pair of trousers, dark pair of shoes, a soft felt hat under the neck and back; a sort of combination sweater and jacket, that is the way I would describe it. It is what is commonly called a blazer jacket; dressed as a man usually dresses for fishing or hunting.

I testified at the Coroner's inquest held on the body of Mr. Gamer on the 11th and 13th of April, 1933. I would say that my memory at that time as to what was at the Gamer home was fresher than it is now. I did not testify at that time, "There was a cigar butt on the window and then right here beneath the back of the body there was an upper plate of false teeth." If this transcript so states it is incorrect.

Redirect Examination by Mr. Poore.

The WITNESS: I noticed teeth protruding from the mouth of the deceased as he lay on the floor. It appeared to me as a partial lower plate which was inverted sticking out, that is the molar parts were sticking out of the mouth.

Witness Excused. [130]

CHARLES R. LEONARD,

a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Charles R. Leonard. I am an attorney-at-law, residing and having

(Testimony of Charles R. Leonard.)

my offices and place of business in Butte, Montana. On the 25th of October, 1935, I was attorney for the defendant in this action and Mr. W. D. Kyle was associate counsel with me.

The paper, the file of this court marked Filed October 25th, 1935, and labeled "Demand" has subscribed to it as Attorneys for the Defendant the names of myself and Mr. Kyle. I prepared or assisted in the preparation of that demand. After it had been prepared by me I took it down to Mr. Meyer's office, Mr. William Meyer, one of the attorneys for the plaintiff in this suit, and served it on him. On the 25th day of October, this year. The names of Mr. Kyle and myself are subscribed to that demand as attorneys for the defendant and for the plaintiff Carl Christian, or C. J. Christian and William Meyer. Mr. Meyer subscribed those names. I left a copy of that demand with him. After I had served this demand upon Mr. Meyer I filed it in the court here.

Mr. POORE: Now I offer in evidence this demand Your Honor.

Mr. MEYER: We have no objection.

The COURT: Let us see what it is.

(Hands document to court)

Mr. POORE: I would like to read it to the jury.

The COURT: Go ahead.

Mr. POORE: (Reading) "In the District Court of the United States for the District of Montana.

[131]

(Testimony of Charles R. Leonard.)

No. 847

STELLA JANE GAMER, Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Defendant.

DEMAND

To Mr. William Meyer and Mr. Carl J. Christian, attorneys for the plaintiff in the above entitled action.

Demand is hereby made upon you by the defendant in the above entitled action that said defendant by its agents and representatives be granted the permission to make inspection and survey of the closet in which E. Walter Gamer met his death, the same being in the former home of said E. Walter Gamer, and that in making such survey and inspection the defendant and its agents be permitted to open a hole in the ceiling of said closet so as to obtain access to the area above the ceiling of said closet for the purpose of tracing the course of the bullet which passed through the ceiling of said closet, and surveying and determining the course of said bullet through the ceiling of said

(Testimony of Charles R. Leonard.)

closet and beyond the ceiling thereof, and also for the purpose of making an accurate map and survey of said closet. The defendant agrees that it will make such survey and perform such work at its own expense and that it will replace any material which it may remove in the making of such survey in as good condition, and leave the said closet in as good repair as the same may be prior to making said survey and examination, and with the least disturbance and inconvenience to occupants of said home. [132]

It will also permit counsel for the plaintiff or any representative designated by them to be present at the time such survey and inspection is made.

This demand is made for the purpose of obtaining evidence to be used upon the trial of the above-entitled cause in the above-entitled Court.

Request is made that this permission be granted as promptly as possible so as not to delay the making of such inspection and survey.

CHARLES R. LEONARD
W. D. KYLE
Attorneys for Defendant.

Service of the foregoing demand is admitted and copy thereof received this 25 day of October, 1935.

C. J. CHRISTIAN
WM. MEYER
Attorneys for Plaintiff."

The WITNESS: Subsequent to the 25th day of October, 1935, I again called at the office of Mr.

(Testimony of Charles R. Leonard.)

Meyer. It would be a guess but I think it was probably 5 or 6 days after the 25th. At that time I called at the office of Mr. Meyer and he received me and I asked what conclusion he came to with reference to that demand, the demand which you have just read to the jury. And he said, "Well we concluded, not to permit the examination contained in that demand." He said, "I talked with Mrs. Gamer about it and we both concluded that the demand will not be acceded to." I said, "Well Mr. Meyer, I don't want to disturb anything there. We would very much like to go in and make that examination." "Well," he said, "Mrs. Gamer don't want the house all torn up." [133] "Well", I said, "the house if it is torn up in any respect it will be a very small matter. You will observe in our demand here that we agreed to put everything back in its original condition, nothing will be harmed and there will be no harm done to the building." But my eloquence didn't have any effect on him, he shook his head and said they would not permit it. I might say this, that several days preceding that Mr. Meyer was in my office; he came in there with Mr. Kyle, who was associated with him in some other case. I said, "Well Mr. Meyer what conclusion have you come to about that demand." "Well", he says, "I haven't given it any consideration," and I said I would like to have him do so, and thereafter I went to his office as I have told the jury and that in my best judgment was a few days after the de-

(Testimony of Charles R. Leonard.)

mand was served; several days after the demand was served. I think the whole thing was within a week anyhow of the day of the original demand.

Cross Examination by Mr. Meyer.

The WITNESS: I don't recall that there was a matter pending in connection with this case at the time you were in my office with Mr. Kyle. I thought you and he were engaged in some other case. I don't recall a matter pending in connection with this case. If you mention it to me I might.

Q. I don't want to mention it in front of the jury but if you insist I will be glad to. Didn't I say to you, "As long as this is pending I haven't even looked at the demand." Hadn't you sent some telegrams at that time and weren't you waiting for an answer?

A. I don't recall anything of that kind. [134]

I served this demand the date that is on there, the 25th of October. I presume I have in my office copies of telegrams which I sent to the New York Life Insurance Company.

Q. Will you between now and tomorrow morning look up all those telegrams that you sent to New York City to the New York Life Insurance Company and tell the court and jury whether there was not pending a matter after the 25th and within a day or two of the 25th which resulted in me saying to you "There was no need to pay any attention to this demand until you received an answer from

(Testimony of Charles R. Leonard.)

your client," and will you tell us that tomorrow?

A. I did?

Q. Yes, that you sent telegrams to New York, and we were waiting for the answer that is the reason I said, "I didn't even look at it"?

A. If it has any materiality I will.

Q. Well it has.

The COURT: Leave the question of materiality to the court.

The WITNESS: I want that done.

The COURT: Bring the papers to court tomorrow morning and we will decide then whether it is material; it is not for you.

(Whereupon court recessed until Wednesday, November 13, 1935, 10:00 o'clock a. m., when it resumed)

(Argument)

Mr. POORE: Do you want us to proceed with other witnesses?

The COURT: I think it would be wise until we examine into it.

Mr. MEYER: We would prefer to complete the Cross Examination of Mr. Leonard.

The COURT: That is agreeable and we can control it as far as possible by instruction.

Mr. MEYER: Very well. [135]

The COURT: Call in the jury.

(Jury comes in) [136]

CHARLES R. LEONARD,

recalled for further Cross Examination by Mr. Meyer.

The WITNESS: I examined my files for copies of telegrams I sent to the New York Life Insurance Company and I have those telegrams with me. The first one was sent October 26th. If the demand says that it was served on October 25th, and filed October 25th, the first telegram was sent the day after I served the demand. The date of the conversation which I related to the court and jury and which I had with you in my office was the 28th.

Q. When did you give me the answer of your company?

A. I phoned you, or you phoned me, I think on the morning of the 30th.

Q. And then you had not given me any answer when we had the conversation on the 28th of October, which you related to the jury yesterday?

A. About the inquiry in my office, about the demand?

Q. Yes. You had communicated no communication to me from your client?

A. I had not received one.

Q. Now is it not true that I said to you in that conversation in your office "Until you get an answer Mr. Leonard I haven't paid any attention and there is no need to pay any attention" and didn't you say yes?

A. I don't recall it but I think it must be true because I have had a conference with Mr. Kyle

(Testimony of Charles R. Leonard.)

who was with us and he has confirmed the date, the 28th, the day the Frank Trial was called, and you and he were together in that matter.

Q. And is not part of the conversation which I just related likewise true, that I told you "Until you had an answer there was no need to pay any attention to the demand". [137]

A. I don't remember that but I think it must be true from what you and Mr. Kyle say. However later, on the 31st I did make a demand in your office and you refused.

Q. Yes, we will get to that right now. On the morning of the 31st, after you had given me your answer on the 30th—first let me ask you, didn't you call me by phone on the 30th and ask me whether I had spoken to Mr. Christian and Mrs. Gamer about this demand and didn't I tell you I would let you know the following morning, that I hadn't spoken but would?

A. I don't remember distinctly but I would not dispute it.

The WITNESS: On the following morning somewhere around 10:00 o'clock I came to your office and asked you if you had spoken to Mrs. Gamer and Mr. Christian and you told me you had.

Q. And also told you that Mrs. Gamer was afraid to disturb her tenant who was in this place, and the tearing out of ceilings and so forth, she might lose a tenant, and was not your reply "Then

(Testimony of Charles R. Leonard.)

am I to understand that you refuse the demand" and I said "Yes under the circumstances that is all we can do."

A. That is not the exact conversation as I understand.

Q. Is that the purport?

A. The real thing she said was she didn't want the place all torn up.

You said the place had been rented and you didn't have control of it.

Q. Didn't I also say Mrs. Gamer was worried, she didn't want her tenant disturbed and you then said, "Well then you refuse," is that correct?

A. Well I don't know as it is in that language; in substance something like that. It was then her position she had no control over it. [138]

I believe I then asked you, "Do you mind giving me the name of the tenant" and you told me you didn't know the name but you would ascertain for me and call me before noon. You gave me the name of the tenant personally, left it in the office. I believe you called me personally between 11:00 and 12:00 o'clock of that morning and said, "Mr. Leonard the name of the tenant in the Gamer home is Phelan." I never came into court and sought an order in compliance with this demand, but I did go out to the house about 12:00 o'clock on the 31st and I rang the doorbell and knocked on the door several times and there was no

(Testimony of Charles R. Leonard.)

response. Mr. Kyle was with me, and I understand he went later in the afternoon with the same result, couldn't get anybody to come to the door. I did not ask you to accompany me. You said it was out of your control and in the hands of the tenant and I thought if I went out in a courteous manner she might permit me an interview and entry and in the interest of justice she should have allowed the ceiling to be taken off because we had to trace the course of that bullet and be able to come here and testify with reference to it. I did not offer to pay Mrs. Gamer rent for that place if the tenant moved because of our tearing down the building; I would not have gone in without the tenant's permission. I didn't get a chance to ask the tenant's permission; the doors were locked and couldn't get anybody to come to the door. I did not in this demand make a demand on the tenant; I made a demand on yourself as attorney for Mrs. Gamer and on Mrs. Gamer.

I don't remember the date this case was tried last but I guess it was in November, 1933, but the record will show that. If you say the record shows we started the trial of this case on November 4, 1933, I will accept that as approximately correct as I generally accept your statements and you do mine. Prior to the [139] time of the last trial I and Mr. Sanders went down to your office and asked leave to make a survey and inspection of the premises 805 West Silver. We made no written demand at that time.

(Testimony of Charles R. Leonard.)

I just went down to your office and said I would like to go out there and make a survey of that closet and bedroom generally and asked whether you would permit it to be done. Mr. Sanders and I made that request. I believe you told me you would talk with Mrs. Gamer and Mr. Christian and let you know the next day. I believe it is true that the next day you called me up and told me that there was a tenant in the house who happened to be a client of yours and it was agreeable to her and that I could go out there, but I don't recall it. I recall that you and Mr. Sanders and Mr. Arnold who testified yesterday, Mr. Christian and myself went out to the Gamer residence; I think Mr. Kyle was also along and you were.

Q. And we went upstairs and at Mr. Arnold's convenience and at the suggestion of yourself and Mr. Sanders he made a survey and took measurements of everything pertaining to that closet and bedroom you wanted?

A. Well the map is in evidence in this court. There was a map made and we went out there with the others and went up in the closet there and looked. I think it is true that Mr. Sanders directed Mr. Arnold in what measurements to make and what was to be included in the map. That was the object of going out there. At that time I looked at the ceiling. The ceiling had been replastered but I could dimly see where the hole was, or had been. I don't recall whether I asked Mr. Arnold to make

(Testimony of Charles R. Leonard.)

any notation on the map of that fact. I have examined defendant's Exhibit 1, and there is not designated upon that map in the ceiling of the clothes closet any point to distinguish it or distinguish [140] the plaster at said point from the rest of the ceiling. I don't remember that I asked Mr. Arnold to designate upon this map any point upon that ceiling which seemed to distinguish it from the plaster upon the rest of the ceiling. Its location was very definitely fixed by the witness.

Q. A couple of days after we went out there, the persons whom I have already designated, you again called me up did you not and asked me whether we would consent to you going out again, that you wanted to make a further survey of the premises, and that I told you I would call Mrs. Symons and if agreeable to her it was agreeable to us; and I did call her and she agreed to it and you again went out and again entered, neither Mr. Christian nor I accompanying you, and made a further survey of the bedroom and closet?

A. I don't know how much survey was made, but we did go out; I wanted an inspection.

You permitted us to go out there; you permitted us to go out at any time and look at the property. I think that is all I requested. At that time we made no request to cut through the ceiling.

Q. Now on this demand which you served on October the 25th, you asked also for the purpose of

(Testimony of Charles R. Leonard.)

making a correct map and survey of said closet—there was one made by a man paid by you, Mr. Arnold?

A. Mr. Arnold made one and I presume he was paid.

We employed him. Referring again to the time preceding the last trial I recall Mr. Sanders and me calling you up and asking you if you knew where the rifle was from which the bullet was discharged which resulted in Mr. Gamer's death. I think you told me that you had it in your possession. We got it I know and it [141] was through your direction that we got it. I don't recollect asking you if you had any objection to me coming and inspecting this rifle but I know we did that and you must have permitted it. I think you told me if I would tell you when I would be down that you would have it in your office to submit to our inspection. I don't recall and I don't dispute that within a few days before the last trial of this case I again called you, Mr. Sanders and I and asked you whether I could again come down to the office and inspect the rifle but we did see the gun and the gun is here in court.

Q. Do you recall on two different occasions I had the gun in my office because of your request you wanted to inspect it?

A. I think you were accommodating then about this matter.

(Testimony of Charles R. Leonard.)

Q. And all of these requests were without written demand by you upon either Mr. Christian or myself representing Mrs. Gamer?

A. I think you were very good about it to permit us to look at these things.

I don't remember any request made in writing. The first demand I recall having made on you in writing was this demand of October the 25th. I think you were perfectly willing on the oral demand before and conceded with our request. I don't recall making any oral demand at all this time. I don't know whether Mr. Kyle or Mr. Sanders or Mr. Poore made any or not. I know a written demand was made. I didn't see the necessity and didn't think I would require a written demand the last time.

Q. Did you state to Mr. Arnold when you were there at the time the measurements were made from which this map has been prepared, did you point out to Mr. Arnold the plaster in the ceiling for it could be seen that the plaster was different from the plaster in the rest of the ceiling? [142]

A. Well, it is in my mind, I would not be very positive about it, but it is in my mind I could see a dull place there where that hole had been plugged up.

I don't know that I pointed out the spot to Mr. Arnold or requested that he measure it so as to ascertain the exact distance from the door and the exact distance from the north and south wall, but I think I asked him several times just where that

(Testimony of Charles R. Leonard.)

hole was and he has told me. I don't recall requesting Mr. Arnold to designate that spot on this map. One of the points in issue in that law-suit was the point of entrance of that bullet in the ceiling of the closet and I think it was testified to in the trial if I remember correctly. I don't recall asking Mr. Arnold to designate the spot or make the measurements with reference to that hole notwithstanding that it was one of the points at issue in the trial and I don't recall telling him not to put it on there either.

Witness Excused. [143]

DR. MILO O. ROBERTS

a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Milo C. Roberts. I am a dentist and have been a dentist 30 years and approximately 20 years of that in Butte.

I knew Walter Gamer during his lifetime and had known him I suppose practically all the time I have lived in Butte. I have done dental work for Walter Gamer. It was probably in March, 1931, that he called at my office the last time to have dental work done. Prior to that time I had made dentures for him. Subsequent to the time that I had made dentures for him someone else also

(Testimony of Dr. Milo O. Roberts.)

made dentures for him and I think that was Dr. Kirby. I believe that Dr. Kirby is now out of the city and possibly in New Orleans, or on the way home. He is not in the city at the present time. I saw the dental work in Walter Gamer's mouth which Dr. Kirby had placed there. At that time Walter Gamer had 6 lower anterior natural teeth. They were the 2 lower bicuspids, right and left and 4 incisors and in common parlance that would be the 6 teeth on his lower jaw immediately over his chin. He had no other natural teeth. He had what I would term an upper false plate and in that plate there were 14 teeth. And they were composed of a cellose material, a composition material which is a very hard substance and is a substance that would not easily break. I would say that the upper plate of false teeth was held in Mr. Gamer's mouth by atmospheric pressure, suction and they were not fastened by anything only by that and moisture, fit and moisture. By fitting the gums perfectly and by reason of [144] that fitting and suction it was held in place without any attaching to any thing in his mouth.

The last time I saw Mr. Gamer's mouth he had what we call a partial removal appliance of teeth in his lower jaw. There were two what we call cast plast, very rigid made of gold or composition fastened to the lower cuspids, that would be outside teeth on each end of the row and then attached to those two clasps with a saddle on the plate that

(Testimony of Dr. Milo O. Roberts.)

fitted over the ridges on both sides of four teeth and on each side a gold pair extending around and along the side of the lower ridge connecting the two sides with one piece. This lower plate of bridge work as we may term it had on either side of the bridgework where it came in contact with the natural teeth a metal clasp which fitted to that natural tooth and tended to hold the bridgework in place; and then in addition to that there was a brace structure across from one side of the bridge to the other side of the bridge, which likewise assisted in holding it in place. The skeleton of this lower plate was made out of gold alloy and the teeth were fastened on with this composition material. The frame work was a composition, a metal composition, this lower plate. The frame work was partly a metal composition. The teeth were then made of porcelain. A composition material fastened the teeth onto the gold part of it. In the lower plate or bridge work were three different materials, the porcelain teeth, a scientific composition material and the gold and they formed part of one plate, all in one piece and are fused together and became one solid piece. This was the condition of Walter Gamer's mouth on the last date that I saw the interior of his mouth, in the Spring of 1931, and it was probably in March, sometime. [145]

Cross Examination by Mr. Meyer.

The WITNESS: I have not made the upper denture. It had been made prior to the last time

(Testimony of Dr. Milo O. Roberts.)

I saw Mr. Gamer. The lower, we call it a removable denture or plate. They are called bridges only they are removable—it could be called that. I distinguish between the two terms. With your natural teeth you can open your mouth a certain distance. If the upper teeth are totally removed and a denture inserted in place of that you still open your mouth to the same extent. It doesn't make any difference. A lower denture and upper denture would not affect that at all immediately; it might in the course of time. In the course of time we get what we call a closure of the jaws due to the moving up of the socket if a person has been without teeth for a long time. When I speak of a long time I mean a period of possibly a number of years, and I don't know exactly but it might start immediately. It would not appear to any great extent after 2 years; it might be appreciable in 5 years but that would depend a great deal on whether the teeth were replaced or not. Assuming they were replaced by a denture, it would depend on the denture whether a sufficient length of the face was filled. There should not be any closure if the teeth were worn.

Mr. Gamer had a plate or denture from 1928, about 5 years prior to the time of his death. His upper plate was a composition material and a very tough substance, more tough than it is hard; it is not a brittle hardness, it is tough. It is breakable. I would say it would break by falling on a hard

(Testimony of Dr. Milo O. Roberts.)

substance, wood; it would be possible for it to break, but I would imagine in the majority of times it would not break, I mean the material [146] itself. The teeth in the denture are composed of porcelain. That substance is quite hard and brittle. If it happened to hit in a particular way, the falling of a plate on a wooden would be likely to break the teeth; it might fall and not hit on the teeth and might hit on the teeth; it might hit on the point and break it off. It would depend largely on the angle it struck the floor.

I spoke of porcelain as a hard substance, by using the word "hard" there it would take quite a little force. I could not exactly distinguish between brittle hard and very hard as I am not an authority on it. Anything that is brittle I suppose is very easily broken. You might define the word that way. It would not be brittle to that extent, porcelain. It is much harder than the general composition of the natural teeth. Of course the enamel of the teeth is harder. You see in these things you cannot make an exact statement about that because of the fact that the teeth are composed of different substance. I am speaking now of natural teeth. Speaking from my extended experience of 30 years and the comparison between teeth manufactured from porcelain and natural teeth, the porcelain teeth are more susceptible to breakage. It is a rather difficult question to answer, comparing the composition which enters into the manufacture of a denture and

(Testimony of Dr. Milo O. Roberts.)

whether that composition would break more easily than the natural teeth or vice versa under exactly the same circumstances. You see the materials would not be subjected to the same conditions; you would have to produce exactly the same condition and it is pretty hard to imagine a material used for something that it is never used for. In other words it would be hard to imagine conditions identically the same under which you could make a test of that kind, but you could bring it about [147] alright.

Q. Would a blow shatter a denture or material of which a denture was composed such as Mr. Gamer had?

A. You mean a rifle shot?

Q. Yes?

A. Yes, if it hits it.

I would think the shock from a rifle shot in the immediate vicinity of the denture would have that effect on it.

Q. Doctor do you know the effect of powder marks on gums?

Mr. POORE: That is objected to as the witness has not been qualified on that score.

The COURT: Overruled.

A. No, I don't recall ever seeing powder marks on gums.

Q. Doctor, if a denture is replaced in the mouth and fits perfectly, that would indicate that the gums were not injured, would it not, or would an injury to the gum affect the fitting of the denture?

(Testimony of Dr. Milo O. Roberts.)

A. Naturally would if it was to any extent, depending on the extent of it.

Q. Supposing it consisted of one abrasion?

A. Might not affect it materially, that is so it could not be worn.

If there was more than one abrasion it would depend on the extent and location of these injuries. When a denture fits perfectly that means that the conditions in the mouth are ideal.

Redirect Examination by Mr. Poore.

Q. Doctor, is it not a fact that if a person has a false upper plate in his mouth that the wider he opens his mouth the [148] more likely it is for the false plate or denture to drop down or to lose its suction or holding position?

A. Yes, that would be the tendency of course.

Recross Examination by Mr. Meyer.

The WITNESS: The reason for that is due to the stretching of the muscles of the cheeks and soft palate and general stretching condition would generally the wider you open your mouth the less likelihood of the suction retaining the denture in place. Some of the dentures would fall or become loosened and some of them would not. That rule does not tell us much. If you open the mouth wide and you have a denture in place, the further you open the mouth the more likelihood for the denture to move. In other words the opening of the mouth tends to relieve the suction.

(Testimony of Dr. Milo O. Roberts.)

Q. To what extent, that is what I am trying to get at; does it relieve the suction, does it relieve it noticeably, thereby impairing the hold on the upper gums of the denture or does it affect it sufficiently so that the plate or denture will wobble a bit?

A. Well it would depend on conditions, on how much suction there was there and how well it fitted and the particular degree of tension on the particular muscles in a certain person's mouth which all affects those things quite a lot.

I couldn't say exactly how well the denture that Mr. Gamer had fitted because it was a couple of years later. When I last saw it, it fitted very well, a good fit. I couldn't say exactly in what way opening of the mouth would affect that denture.

Q. You don't know whether it would loosen it or what effect it would have? [149]

A. Possibly would; if his mouth possibly could be opened fairly wide without being loosened,—I couldn't say exactly.

I don't know whether it would loosen or not. If it would loosen it might partially fall down on the tongue and might not fall clear down; might release it a little ways and then it would be movable in the mouth and be moved in the mouth.

Witness Excused. [150]

DR. J. C. SHIELDS

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is J. C. Shields; I am a physician and surgeon and have been for 19 years, practicing 17 of that time in Montana, 17 years last past in Butte, Montana. Most of my practice is in St. James' Hospital.

In the practice of my profession as a physician and surgeon I have had experience in examining and treating bullet wounds and that experience has been considerable, a large number but I could not state positively how many.

Q. Will you tell us what the effect of the entrance of a bullet in flesh, in human flesh, appears like?

A. At the point of entrance of a bullet the edges of the wound are turned inward toward the muscle or flesh inside. The wound itself is either circular in form or slightly triangular; the edges of the skin are darkened, discolored, seared. And if you attempted or tried, as I have on many occasions, to close the wound with sutures there is a definite loss of tissue and puckering unevenness, because of the lack of tissue in the center of the wound.

In other words as the bullet passes through the flesh it clears away a certain amount or portion of the substance of the flesh. That is the point of entrance of the ball that I described. The point of exit depends on what happens to the ball in passing

(Testimony of Dr. J. C. Shields.)

through; it also depends as to how close apparently the individual is to the ball when it is fired. If it hits bone and becomes mushroomed, as I think the term is used, flattened out, the exit is [151] large. If it hits nothing at all or is a steel jacket bullet, steel nose, I should say, they leave a very smooth exit. The exit differs where it is smooth from the entrance in this that those edges if it has passed through any amount of flesh are not seared and blackened to the extent they are where it enters, and the wound it makes, the edges of that particular wound are not turned inward, toward the flesh. If the skull in the parietal region is blown out for a space of approximately 3 or 3½ inches in diameter, it would be my opinion that that was the exit of some explosive, highly propelled object.

Q. Doctor, assuming that the body of a man approximately 51 years of age, weighing 175 pounds, approximately, and of the height, approximately 5 feet 10 inches, is found lying upon a floor of a bedroom in a home with a Savage model 99 300 Rifle alongside the body, and the back of the skull of this body for a width of 3 or 3½ inches appears to be blown out and has disappeared, leaving a hole there which would require a filler of the dimensions which I have specified on preparing him for burial; and assuming that there are no powder marks on the face of that body and that the only wound upon the face of the body is in the left lip commencing about ⅛ of an inch from the left cor-

(Testimony of Dr. J. C. Shields.)

ner of the upper lip and extending in the upper lip towards the nose about ½ inch, and which wound is a wound both on the outside of that lip and on the inside of the lip and is held together in the center by muscular tissue so that when the lip is sewed up it fits together perfectly, without leaving any puckering; and assuming that this body has 6 natural teeth, being the 6 front teeth on the lower jaw immediately above the chin, and that attached to those teeth is a bridge with 4 teeth on either side, braced to the natural teeth by a metal hook or clasp, on either side of the [152] lower natural teeth and supported by bridgework across and under the tongue in front, supporting the bridge work, and that the upper denture is a false denture and that the false denture is found upon the floor unbroken and the lower denture is found to be turned out so that the teeth are exposed to view, the bridge work is turned up and out; and the lower jaw of this body is broken in 3 places, one about a point on the chin, one about the points that the jaw would intersect the line of the lower lobe of the ear and one break about midway between those 2 points and neither of those fractures being a compound fracture, that is no breaking of skin so that it is shown on the outside or inside; and there being no hole or wound in the face or in the head, or in the eyes, or in the nose, or in the ears, or any wound except the wound in the lip which I have designated and the

(Testimony of Dr. J. C. Shields.)

one in the back of the head which I have designated as being about 3 or 3½ inches in diameter.

What would you say assuming that you found this body in this situation and with the facts which I have stated to you,—first, would you say that this wound in the lip was caused by a bullet—just a moment. Let me add to that question in fairness to you,—and assuming that there is no wound on the gums, either upper or lower of that body. Now first, what would you say caused the wound in the lip. Would you say it would be a bullet wound?

A. No, it does not answer the description of a bullet wound for 2 reasons; first, it is not circular or triangular in form; the description that you have given does not include a searing and darkening of the edges of the skin; second, the muscle tissue that you stated holds the inside of the wound together would be destroyed. There would be a straight wound passing through and when you would suture it, it would pucker, that is it would not [153] fit accurately.

Q. And what would you say as to what necessarily would happen to the gums immediately back of the lip?

A. Immediately back in the gums in all probability would be injured, especially the teeth, if there were teeth back of it, if a bullet had passed through the wound as you have described it.

(Testimony of Dr. J. C. Shields.)

Q. Now second, assuming the state of facts which I have indicated to you where did the bullet enter?

A. You are assuming that a ball had entered?

Q. Yes.

A. The mouth would have to be wide open for a ball to pass in the mouth without injuring the lips or else the muzzle of the gun would have to be in the mouth. There is only the two possibilities as I see it.

Cross Examination by Mr. Meyer.

Q. Doctor, you say the mouth would have to be wide open. Would that depend on the caliber of the bullet?

A. Well, what I mean wide open, we sometimes sit with our mouths partially open and the teeth almost touching. It would have to be some considerable distance between the upper teeth and the lower teeth and the upper lips and the lower lips.

The WITNESS: When I say the mouth would have to be open I mean the mouth would have to be sufficiently opened so it would afford a point of entrance for the bullet. I am no expert on fire arms; I am just a surgeon. I have used firearms a little. I have seen a 300 Savage Rifle such as is in front of me marked plaintiff's Exhibit 1 and I have used them a few times, but as to [154] knowing about them or anything, or having knowledge, I have not. As I understand 300 is the des-

(Testimony of Dr. J. C. Shields.)

ignation of the diameter of the bullet, meaning that the diameter of the bullet discharged from a rifle such as this is three-tenths of an inch. What I mean to say when I said that the mouth would have to be opened was that it would have to be sufficiently opened to permit a bullet of this dimension to enter.

Q. Now Doctor, the muzzle of the gun in the mouth—could you tell or would it make any difference how much of the muzzle was in the mouth?

A. You mean how far the muzzle would be in the mouth if it exploded in the mouth?

Q. Yes.

A. Based on what?

Q. You said the muzzle of the gun would have to be in the mouth. What I am trying to get at is, would it have to be in the mouth beyond the sight, or just the very tip of the gun. I mean would you have to insert the rifle beyond the sight?

A. Well it would look to me, in order to get it inside of the teeth and lips, that part of the sight would have to be placed back of the lips.

Back of the lips, that is posterior to the outer surface of the lips; inside of the lips. I have fired a rifle of this kind but as to knowing anything about them I do not. I know they do considerable damage.

Q. But do you know whether there is any difference in the amount of damage done if there is a soft nose or hard nose bullet fired?

A. Yes I know, that is in a wound, and I am speaking of course of a wound. [155]

(Testimony of Dr. J. C. Shields.)

Q. Which creates the larger wound?

A. The soft nose bullet if it is fired and hitting any hard object, especially bone, it flattens and becomes distorted and is no longer round and has a tearing force with it. Now the steel bullet may or may not, that is the steel tip bullet, the ones I have seen, some will pass right through and leave a clean wound; others when *impacketed* as against the bone or a hard objeet, if the steel tip is torn off, instead of getting one part of the bullet passing through you get several. So it depends on the force, I suppose, and the angle—I am not enough a physicist to determine, but I am telling you what the findings are under two conditions.

You never see two bullet wounds that are the same with this exception, that at the point of entrance as I have described, the skin is seared and discolored and blackened, the edges are turned inward and you have a circular or a triangular wound and when you come to suture it together, or attempt to suture it together there is a definite loss of tissue.

Q. Is that affected in any way by the distance from which the bullet is fired?

A. Well if the bullet is close enough in order to penetrate and has not lost its force, I don't think it is materially altered. Now the discoloration around that hole, if you mean discoloration clear around the wound outside, then it does depend on whether it is close or whether it is at a distance, or whether the skin is covered with clothing or not.

(Testimony of Dr. J. C. Shields.)

I don't think it depends a great deal on whether the gun is clear or not; it depends more on your powder, I imagine, if you got black powder or not. I am speaking of the skin for some little distance around the wound. My experience is that soft nose [156] bullets do mushroom if it strikes a hard object. I have removed several bullets that mushroomed very little; now why I cannot tell you; it might be that they were at such a distance when then entered the flesh that their force was spent. That has something to do with soft nosed bullets as far as wounds are concerned. Soft nose bullets will mushroom if they strike a hard substance. I would consider bone such a substance. The back part of the skull is composed of bone, not only the back part but the floor of the skull, anything we speak of is bone. Speaking of the back part of the head and what enters into the composition of the back part of the head, on top you have hair and then you have the scalp and it represents the skin. Underneath the skin is a small layer of what is known as fossa, beneath the bone is covered with periosteum, which is a fibrous attachment to the bone itself that supplies blood. That is exterior to the bone. That is all which is exterior to the bone of the skull. Then you strike the bone of the skull itself. Inside the skull you strike 3 coverings first; now I am describing from outside inward, the 3 coverings of the brain, and they consist of the dura, which is the outside covering and which is a

(Testimony of Dr. J. C. Shields.)

fairly thick tenacious membrane; the arachnoid tissue which comes beneath, which is also a membrance which is supplied with blood vessels, and a large extent with lymphoid tissue, and then beneath that the pia-mater and that is the membrane attached directly to the brain, covering the brain itself, and finally in the arachnoid space there is considerable cerebral spinal fluid. So that a bullet entering through the mouth and making its exit in the back would not only go through all those but it would have to, if it went through the mouth, it would first have to go through considerable tissue in the back of the [157] mouth and through bone there also. That bone is before it strikes the brain tissue, that is coming from the mouth going upward and backward, coming from the interior of the mouth. First, you get the soft palate, which consists of several muscular tissue and mucus membrane, posterior to that; and posterior and above is the nasal pharnyx and pharnyx. Posterior to that again comes more mucus membrane and muscular tissue, then beneath that, or back of that and above it is the floor of the skull, consisting of bone, which is the same bone, that is the occipital bone, which is turned forward and under to support the base of the brain. That is not so thick, not quite as thick as directly posterior, but it is a good heavy flat irregular bone. Now I have described the tissue and substance through which a bullet would have to

(Testimony of Dr. J. C. Shields.)

pass to make its exit in the back of the head; and then the brain, that is one other thing I didn't mention. It would have to pass through the brain, a semi-solid substance. It has been my experience that a soft nose bullet will mushroom more than they do not.

With reference to a hard nose bullet my experience is they do not mushroom as much as the soft nose bullet. A wound at the point of exit where a hard nose bullet is used, if the steel jacket is torn off, it will be just as large as from a soft nose bullet. If the bullet retains its form the wound may be very small. As a matter of fact when you speak of gun-shot wounds and what occurs it is very hard to individualize cases, changes in firearms and powder do enter into those questions.

With reference to the laceration upon the upper left lip of Mr. Gamer and the description of it as given by Mr. Poore in his hypothetical question was that it fitted accurately. This laceration could not be caused by a wire for this reason, if I recall correctly how it was given, that the mucus membrane on the inside [158] of the lip was torn and the skin on the outside was torn and the muscle tissue held in between. Now a wire would not do that, it should be only on one side. The cutting force of a tooth would not be sufficient to cause this, for this reason, whatever caused the wound has been a stretching force. The mucus membrane on

(Testimony of Dr. J. C. Shields.)

the inside and the skin on the outside haven't the elasticity to stretch that the muscle tissue has between, and whatever it was had stretched the lip to cause such a wound, and I have seen many that were caused by such force. By stretching the lip it broke the mucus membrane inside and the skin outside because they have less elasticity than the muscle tissue between, and the muscle tissue between, and the muscle tissue held. Now what they would be I couldn't state, but it is some comparatively dull object, not sharp, particularly like a knife, because a knife would cut through. A round tooth would do it if the stretching was enough that is if it had surface enough. A tooth could do it if placed in the proper position and the lip was stretched right. The tooth would have to be placed in an ideal condition so such a laceration could be caused by a tooth; I think it would have to be placed in one particular condition and must not be sharp,—if fairly round and large enough. I would be more inclined to think that several teeth, that is 2 or 3, or a portion of a false plate would be more likely to do it than 1 tooth.

I testified at the last trial of this case. I have now examined my testimony which you have handed to me of the last trial and that is my testimony substantially today. At the last trial I was asked "Q. No, but a tooth, a sharp tooth from the inside could cause a laceration of that kind? A. I would not say a sharp tooth; it would be some rounded

(Testimony of Dr. J. C. Shields.)

portion of the tooth that would do it. Q. Well then, a tooth could do it? A. Yes." [159] Did you so testify?

A. Yes.

Q. You made no qualification at that time?

A. Well really I couldn't remember my testimony at this time. I am just giving you my opinion.

I testified at that time that a round tooth and unsharpened could do it.

Re-Direct Examination by Mr. Poore.

The WITNESS: I have had experience with powder burns; have taken care of a number of powder burns. They are not such as can be washed off or removed from the face; washing won't remove a powder burn; they become embeded in the skin and it forms what we call a tattoo.

Q. Now I would like to ask you this question and if you feel qualified to answer it I want you to do so and if you don't I would like to have you so state.

Assuming that a ball which was fired out of this rifle and which passed through Mr. Gamer's head was a bullet 150 grains in weight known as a soft nose bullet, and that this rifle is a 300 rifle which means three-tenths of one inch in diameter; and that the muzzle velocity of that bullet is 2700 feet per second, and the striking force at the muzzle of that gun is 2340 foot pounds; and that the muzzle was placed inside the mouth of this man

(Testimony of Dr. J. C. Shields.)

and fired. Would that explosive force have the effect of creating the wound on the lip which I have described and forcing the lower false teeth upward and outward.

Now if you feel qualified to answer that question, do so, if not say so. [160]

A. Well, with the force as you have described it would force the teeth forward, if the explosion took place back far enough in the mouth. In other words if the muzzle of the rifle was posterior to your plate, or the greater portion of it was posterior, that is the muzzle was posterior, to the greater portion of the plate, the explosive force would then be inside the mouth, and your explosion would follow the lines of least resistance, that is your hot gases, and it would pull the teeth forward because that would be the least line of resistance for those teeth, and it would exert a stretching force on the lip, perhaps on both lips.

It would be a sufficient force, in my opinion, to break the jaw as you have indicated in your hypothetical question, shatter it all to pieces; it would just be a problem as to how much damage it would do.

Re-Cross Examination by Mr. Meyer.

The WITNESS: The force would be terrific.

Q. Would it be likely to injure the gums?

A. Well you have got these gums covered with your false teeth.

(Testimony of Dr. J. C. Shields.)

That is just the upper gums. The upper teeth was a denture false plate and the lower he had those natural teeth upon either side of which were fastened some false teeth,—the explosive force, if he had his natural teeth in good condition—the bone would break, I think in my opinion, the lower jaw bone, because it is movable. The upper jaw bone might or might not break. It is fastened there firmly to the skull. If the person removed the upper denture you would think there would be some marks found on the gum. I would be inclined to think, due to the hot gases [161] which you get at a very close gun shot wound, there would be some burning, that would be my opinion. It would be a possibility that the upper gums would be burned. Not seriously burned, but seared. I think that your upper plate could be restored. I am speaking and judging by the wounds I have seen burned on the skin from close contact. I have not seen wounds on the gums from close contact; have never seen close contact on the gums. I have never seen the interior of a mouth after the explosion of a rifle therein. I don't know what the effect is upon the gums or interior of the mouth and have to reason from what I know of the skin outside, and reasoning from what I see on the outside or what occurred on the outside is not at all accurate and is entirely speculative. I couldn't tell you how much heat is generated by gases which form. If

(Testimony of Dr. J. C. Shields.)

you stand close enough you see a blaze or a flash at the mouth of the gun, so the gases necessarily have to be hot; if you stand close enough to a gun you see a flash or a flame. It burns. The effect of that on the tissues of the mouth would be to burn the tissue.

Q. I suppose the more highly explosive nature of the gun, the greater the burn?

A. I don't know about that; I couldn't tell you. I don't know how much powder there is in one of these 300 caliber bullets. The explosive force would be the greatest in the mouth, assuming that the muzzle of the gun was in the mouth; the immediate explosive force right at the muzzle as the bullet comes out would be greatest in the mouth.

Q. Would the explosion be accompanied by a terrific shock?

A. What do you mean by shock?

Q. I mean shock to the membrane to the interior of the skull?

A. Well it would be blown out I would think. [162]

Q. Through the back of the head?

A. Yes, the greatest force would go through the back of the head.

Q. What would be the effect on either side of the head, on the jaws for instance?

A. Well the lower jaw, with the great explosive force in the mouth, being movable, would probably

(Testimony of Dr. J. C. Shields.)

be forced down so rapidly that it would break; the upper jaw being attached firmly to the skull there might nothing happen.

It is hard to tell whether there would be any difference between the right and left lower jaw so affected; it all depends on your lines of resistance. If it were sufficient to break either jaw there is no reason why it would break the right jaw and not the left, except the lines of force. I don't mean the line of the bullet. I mean by lines of force, assuming that the force is inside the mouth as to what direction that force takes, as to which side of the mouth the greatest force is exerted. The wound itself might or might not indicate upon which side the greatest force was exerted. That would not be indicative of anything. You are asking me almost the impossible when you are asking what will happen when that amount of force is exploded inside the mouth.

Q. What do you mean by that, that no one can tell what will happen?

A. You can tell this, that that force is going to escape in some direction; if it blows off the top of the head the greatest part of the force has gone in that direction; the lower jaw, of the two jaws that an individual has, the lower jaw is movable, so with that amount of force inside the mouth, the lower jaw in all probability would be snapped downward and the force of that [163] jaw going down so quickly would break it.

(Testimony of Dr. J. C. Shields.)

I couldn't tell you which side of the jaw, or both sides, because you can exert a strain on a leg or long bone and you cannot tell where it is going to break. In other words it is problematical.

I don't know anything about the weight of this gun. I have never had a gun that did not have a little re-coil or kick, but I cannot tell you anything about this one. I have fired a gun of this type and it had some recoil. I have not had any experience with holding a gun in the mouth, as to what happens to the gum after discharging it; have not seen the effect on the body of one who did and I don't know what happens to the gun. I have had occasion to examine people who were reported to have committed suicide and have seen what was supposed to be the gun that was used. I never saw them with a grasp on the gun; didn't see the hold that the individual had on that gun and don't know what kind of a hold they would have, whether firm or loose.

Re-Direct Examination by Mr. Poore.

The WITNESS: The lower jaw is one piece, hinged in two places, hinged on the right and on the left side, but one piece of bone, when they come to adult life, but before there is a junction. The embryonic originates as two pieces and there is what we call a symphysis right at the joint where they join.

Witness Excused. [164]

GUY BLISS

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Guy Bliss. I am a salseman for the New York Life, the defendant in this action. I was in Butte, Montana, in the month of June, 1933, and at that time I called upon Mrs. Stella J. Gamer at her home on West Silver Street and discussed with her the matter of taking the face value of the policy. Mrs. Gamer instructed me to call on her counsel, Mr. Christian, and see him about it. And thereafter, on or about the 9th day of the same month, June, 1933, I called on Mr. Christian at his office, and I offered him the check in return for the policy. He stated that he would postpone action on that matter and he would notify us at the branch office. I believe that is approximately what he told us. He refused the check, that is he put off accepting it. He told me to hold the check until he notified me. He did not thereafter notify me.

The document which you hand me marked defendant's Exhibit 4 for identification is for the same amount and same date and I think it is the check which I tendered to Mrs. Gamer and subsequently to Mr. Christian for Mr. Gamer. I identified that as the same check.

(Testimony of Guy Bliss.)

Documents received in evidence without objection, marked

DEFENDANT'S EXHIBIT 4

and is as follows:

NEW YORK LIFE INSURANCE COMPANY

No. P216737 374684 New York, June 5, 1933

[165]

THE NEW YORK TRUST COMPANY

Pay to the order of Stella Jane Gamer as Executrix of the Estate of Edward W. Gamer

.....$10066.96

Ten Thousand Sixty-six 96/100 Dollars

In full settlement of all claims under policy

9692790

G. C. Tucker
For Cashier.

J. S. Churchill
For Treasurer

(Stamped) "Cancelled"
P.216739
P.218247
October 26, 1933.55 [166]

Cross Examination by Mr. Christian.

The WITNESS: I think that is the check I tendered you. The check says on its face "In full settlement of all claims under policy." I think you told me at that time that you claimed double the amount of the check as due under the policy. I am not quite able to say whether there was any additional tender of that check or not. I know the com-

(Testimony of Guy Bliss.)

pany has made offers of tender of the original amount. Before I would deliver the check there was something to be done on your part, you were to deliver me the policy.

Witness Excused. [167]

Mr. POORE: May it please the court it is stipulated between counsel for the respective parties that $10,000.00 of the amount represented by this check, defendant's Exhibit 4, received in evidence, was the face value of the policy, plus the unpaid dividend of $7.54 and plus interest on the $10,000.00 to June 5, 1933, at 4½% per annum, and that $10,066.96 was the total amount of the face value of the policy on June 5, 1933.

Is that correct, Mr. Meyer?

Mr. MEYER: That is correct, Your Honor.

The COURT: Very well, let the record so show. Call the next witness. [168]

CLYDE L. McNEIL,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Clyde L. McNeil. I am 47 years old and at the present time my occu-

(Testimony of Clyde L. McNeil.)

pation is that of salesman for the Montana Hardware Company, salesman in the Sporting Goods Department of the Montana Hardware Company. I am in charge of the Sporting Goods Department of the Montana Hardware Company, and have been in charge of that department for 15 years last past. Prior to that time I was employed by the Copper City Commercial Company of Anaconda Montana, for a period of about five years, and during that time was in charge of their sporting goods division, and worked in the hardware as well, and also worked in that capacity for the Missoula Commercial Company of Missoula, Montana; worked there for one year. I was not then engaged as manager of their sporting goods division, but I did work in the sporting goods division. In connection with my duties of being in charge of the sporting goods divisions of these stores, I handled different makes of guns. I have done some repair work on guns and still do and I have tested guns for accuracy and also for penetration. All together I have had approximately twenty years' experience in this character of work. Outside of my duties as manager of the sporting goods division of these stores, I have had experience with rifles and with high power rifles and I presume that experience has been around about thirty years.

I was born at Missoula, Montana, and I used to live in the upper valley, the Bitter Root Valley.

(Testimony of Clyde L. McNeil.)

Hamilton, Montana, was my home. I have hunted large game practically every year I [169] guess, during that time, and I have killed large game all seasons, and from that experience I have an idea of high power rifles upon flesh and bone.

The rifle which you hand me, plaintiff's exhibit 1, I perhaps have seen before. If it is the rifle which belonged to Walter Gamer, I saw it before; I sold Mr. Gamer a gun at one time; sold Walter Gamer a 300 Model 99 Savage Rifle. I recommended to Mr. Gamer a gun, and my memory is that it was identical with this exhibit. I cannot recall the date of that as I sell a good many guns, but it was four to six years from this date. If he died on April 10, 1933, I think I sold the gun to him something like two or three years before that.

I knew Walter Gamer very well and had known him about ten or eleven years. He bought sporting goods such as rifles and ammunition from me.

I recommended to him the purchase of a 300 Savage Rifle, Model 99. This gun is known as a take-down model, and I will now take it down. (Witness proceeds to do so) In taking this gun down there is on the wooden framework of the gun a ratchet. You press the ratchet forward and remove the wooden framework, and then turn the barrel to the left and unscrew it from the butt of the gun and replacing the wooden framework of the gun and you have it taken down so that you can put it in the case. That is the purpose of taking

(Testimony of Clyde L. McNeil.)

it down. I will now replace it in the condition it was. (Witness proceeds to do so). The gun has been replaced now in the condition it was before I took it down.

In describing this gun there is a safety catch immediately back of the trigger which when pressed forward locks into the lever of the gun, the mechanism. When that safety catch is [170] pushed forward into the lever of the gun it cannot be pulled; it is on safe. You have now cocked the gun. On the top side of the gun there is a little notch or pin a quarter of an inch in height, and that indicates that the gun is cocked and ready to fire. When the trigger is pulled that goes down. Before you pull the trigger, after it is safe, you have to move the safety back. That is the effect of it.

I think the magazine of this gun will hold five shells with one in the barrel. In order to load the magazine of the gun you throw the lever down. The magazine is the revolving type. You put your shell into the top of the gun and press it down and the magazine revolves; and press another shell on top of that and it continues to revolve until you put the number of shells you wish in the magazine. There is an indicator on the left side of the gun. When there are no shells in the gun the indicator shows a cipher. When one shell is placed in the magazine it shows "1", and when two is in the magazine it shows "2", and so on until filled. When you desire to place one shell in the chamber or

(Testimony of Clyde L. McNeil.)

barrel after the magazine is loaded you throw the lever forward and that raises the shell to a point even with the chamber of the barrel. When you pull the lever back that forces the shell into the barrel and then the gun is loaded and ready to fire. If you desire to load that gun without putting a shell in the magazine you could press the lock back on the top of the magazine and with your finger or thumb force the shell into the chamber of the gun without putting it in the magazine.

I have now carefully pulled the trigger, and as near as I can estimate the number of pounds pull that trigger has in order to fire the gun, is between three and four pounds. I [171] have a scale with me and it is what is called a "utility" scale and it registers about fifteen pounds. I have checked the accuracy of this scale on weights used for that purpose and did that last Saturday. This is a sliding sleeve scale and the purpose of it is to get correct markings on there. You are supposed to move that sleeve down to the first marking on the scale in order to have it accurate. This scale is now in condition to accurately measure in one quarter pounds; it won't weigh under one quarter pounds. You can weigh a quarter of a pound but nothing else. It is graduated up to a quarter of a pound. You can tell within a quarter of a pound the correct pull on the scale.

I have now placed the pulling portion of the scale immediately in the center of the trigger and

(Testimony of Clyde L. McNeil.)

have now pulled the trigger and it shows three and one half pounds. This shows that it requires three and one half pounds pull directly upon that trigger in order to discharge the gun if it were loaded.

The kind of shells they were manufacturing for this particular make of gun up to the 10th day of April 1933, and still do, was a 150 grain bullet. They did not manufacture any other weight bullet at that time and up to that time, not the Remington Arms Company, which was the ammunition which we were carrying at that time. We were handling only the Remington Shells at that time, up to that time. The only shell which the Remington Arms Company made for this character of rifle up to the 10th day of April 1933, was a 150 grain bullet. They made that bullet in a metal jacket and bronze point expanding. A bronze point expanding bullet is commonly known and styled the mushroom bullet. I recommended the bronze point expanding bullet to Walter Gamer and sold him that [172] character of bullet. I remember Walter Gamer saying that he was going on a hunting trip in the fall of 1932, but whether he went or not I couldn't say. He did not invite me to go on that particular occasion. On that occasion I sold him a 150 grain expanding bullet for this gun.

The bullet or loaded shell which you hand me is one like I sold to Walter Gamer for this particular gun; identically the same in every respect. This shell is what is known as a 150 grain bronze pointed

(Testimony of Clyde L. McNeil.)

bullet. The portion of the bullet which extends beyond the brass part of the shell as made up is of a metal jacket a metal point. I couldn't tell you what that metal jacket is composed of. It is a metal that is harder than the jacket; it got to break the jacket when it comes in contact with anything. Back of the portion of the jacket which is not visible in this shell there is a lead filler. The point which is on the end of the projectile is a composition also, a metal of some kind, harder than lead.

The effect of this pointed portion of this projectile which extends beyond the metal jacket, when it comes in contact with bone or any hard substance, travelling in its course, this is forced back into that case which breaks and deforms that case which makes the bullet mushroom. By mushrooming I mean turning back, expanding. That would also give the point of the ball a very much ragged edge. The barrel of this gun has a twist in it. Every high powered rifle has a twist in it, and in the American make of gun the twist is usually to the right. In this gun the twist is to the right. The extent of the twist in this gun, in this barrel is between one and a half and two in twenty-four inches. The purpose of the twist is to rotate the bullet. As the ball is fired from that gun it [173] rapidly rotates on its axis by reason of the twist in that barrel.

When I speak of a 150 grain bullet I mean that that is the weight of the bullet in grains, and it has nothing to do with the amount of powder in that

(Testimony of Clyde L. McNeil.)

shell. I don't know the amount of powder that is in this shell which I have shown here; they don't specify the amount of powder in the shell. The amount of powder is arranged so that it will bring the velocity of the bullet to a certain speed. The powder contained in this shell is known as smokeless powder, and that is known as nitro. That powder differs from black powder in that it is a faster burning powder. This nitro powder as it is exploded forms a gas, and the instantaneous expansion of the gas is what gives the force to the bullet. They never load these shells so that they are tight or completely filled with powder; I have never seen one that was. When you shake the shell you can usually hear the powder. That is to generate that gas when it is first ignited and forcing the bullet out of the case. It enables the exploding powder or expanding gases to find the point of least resistance immediately, otherwise you might break the barrel or shell; that could happen. If you pounded that in there tight and fitted it like black powder, you might explode your gun.

Mr. POORE: We offer the loaded shell in evidence.

Mr. POORE: No objection.

Object marked Defendant's Exhibit 5 and admitted in evidence.

The WITNESS: The muzzle velocity of the 150 grain ball, 300 Model 99 Savage Rifle is 2700 feet per second. If a ball were fired from the muzzle

(Testimony of Clyde L. McNeil.)

of that gun, or fired from that gun, of the character of bullet which I have described, 150 [174] grain ball, it would have a muzzle velocity of 2700 feet per second. The muzzle energy in foot pounds of the 150 grain bullet 300 Model 99 Savage Rifle at the muzzle is 2430 pounds. The bullet fired from that gun, at the time it leaves the muzzle, would have a muzzle energy in foot pounds of 2430. That represents, or the foot pounds represents the force it would take to raise 2430 pounds one foot perpendicular. In other words the force and energy would be sufficient to raise 2430 pounds vertically one foot, or sufficient to raise one pound 2430 feet at muzzle velocity. That muzzle velocity decreases as the bullet passes on its course until it finally reaches nothing.

The meaning of "99" in the make of a "99" Savage Rifle is the way the guns are graded, that is the year in which the gun came out, in 1899. The Letter "G" on there signifies the grade of the gun. The 300 Savage Rifle of this character of make came out in 1899, and it is therefore known as a "99' Model.

I have made experiments with this character of gun and this style of ball or loaded shell to determine how far powder burns would be visible from the muzzle of the gun upon the gun being exploded. I made such tests since the 10th day of April 1933, at the request of attorney William Meyer here. I used a 300 Savage gun and if I remember right I got the gun from Mr. Meyer, and it was a gun similar to this gun. I never took the number of that gun

(Testimony of Clyde L. McNeil.)

and couldn't say whether it was this identical gun or not; it was a gun like this however; a gun like that; the same kind of a gun; the same style. The experiments which I made at the request of Mr. Meyer were that I took the distance from about one up to twelve inches [175] as I remember, 12 to 14 inches, and I fired about 12 or 14 shots. In that test I used a piece of paper as my object or target. It was a sort of dark corrugated paper, and I fired this gun with the loaded shell as described here at that paper holding the muzzle of the gun one inch from the paper. I then had powder burns on the paper. I then fired it two inches from the paper, and still had powder burns upon the paper; I then fired it one inch further back each time until I reached ten inches, and I had powder burns upon the paper at ten inches. I can't remember exactly at what point in firing the gun I ceased to have powder burns upon the paper, but it was around 12 or 14 inches. I am positive there were powder burns upon the paper as far back as ten inches. I afterwards showed those paper targets with the powder burns on them to Mr. Meyer. I haven't got them now. I don't remember the date I did that, but it was shortly before the trial that I made those tests, two or three days before the first trial. If this first trial took place on November 5th, 1938, then I made the tests two or three days before that date. I made those tests in the basement of my home.

(Testimony of Clyde L. McNeil.)

When a gun such as described here is discharged the gas pressure from the explosion of the powder in the shell is a continuous pressure until the muzzle of the gun is reached, and when the muzzle of the gun is reached then this expanding gas pressure is dissipated at the muzzle of the gun in the point of least resistance. If the gun were fired in the open air with nothing to obstruct the dissipation of the exploding gases, or exploding powder, it would make its loudest report and the expansion of the gas would be taken up in the cushion of the air. If you commenced to confine that explosion, the [176] more you confined it, the more effect you would have from that pressure, that is the more visible effect you would have. And if you confined that gas explosion to the interior of a man's mouth you would have a muffled sound.

Assuming that this rifle which is identified here and which is described to the jury, were held at a point away from the face of a human being as far back as ten inches, I would say that you would have visible powder marks upon the face of that individual if there were no covering of any kind on the face.

Q. Have you ever seen a high powered bullet such as or similar to the bullet described here in evidence and the gun here in evidence shot through a container such as a can of water closed, or a can of tomatoes sealed?

A. Yes I have; not a 300 Savage, but another high power gun.

(Testimony of Clyde L. McNeil.)

I have seen it fired into a can of tomatoes sealed, and the effect is that it flattens it out; it flattens the can perfectly flat, and the contents of the can flow out, that is dissipated in the air. The same is true of a sealed can filled with water, or a sealed container of any kind and filled with fluid. The reason that you have that effect is, the explosion of that bullet in the water—or the reason you have that effect is the speed with which that bullet penetrates and enters into the fluid in the can or container, expanding it instantaneously and causing an explosion.

Q. Now if a gun such as the one we have introduced in evidence and described here, were inserted in a man's mouth, the man we will say weighs 175 to 190 pounds and who was five feet ten inches in height, of normal health, and the gun is placed in his mouth and then discharged, state whether or not in your [177] opinion and in your experience from seeing the effect of exploding guns of this character, the force of that explosion would be sufficient to blow out or turn out a set of false teeth attached to six natural teeth in the lower jaw by means of a wire clasp on either side of natural teeth and held together in the mouth by a wire or band or strap across the teeth—would the effect of that explosion in your judgment be sufficient to blow those teeth outward?

A. Well I never experienced anything like that, really I don't know; I would think it would though. The force would be terrific. It would not surprise me at all if such a thing would happen upon experi-

(Testimony of Clyde L. McNeil.)

mentation of that kind. I would also think it would be possible to inflict upon an individual a fracture of the lower jaw in three places, one place the point on the chin; one place about the line of the lower part of the right ear, and another place midway between those two points.

The character of the wound made by a bullet at the point of entering the flesh, as a rule the flesh where the ball enters is generally just about the size of the ball, or smaller; it is a small hole about the size of the ball. I think that the bullet would have to carry away a portion of the tissue with it.

Q. And when the bullet passes on through, and we will assume that it passed through the head of a man, being held in the mouth and passed through the back of the mouth and through the bony tissue of the skull, into the brain and through the brain tissue, and through the bony tissue and substance of the back of the head, what would be the character of the wound on the outside, using a gun and a bullet similar [178] to the one that has been identified here?

A. I would say the bullet would expand.

Q. And what sort of wound would it leave on the outside of the head?

A. It would leave a good deal larger size than where it entered.

I think it would be apt in my judgment to blow out the back of the head. That is what I think it would do. A bullet which is mushroomed to any extent has a more or less jagged and ragged edge.

(Testimony of Clyde L. McNeil.)

A ball travelling as fast as a bullet which I have described on its axis in the course of its flight from the muzzle of a gun, would pick up tissue, threads of tissue of different size and increase its size as it travelled through.

I have killed large game with high powered rifles and I have seen under ordinary circumstances the ball would pass through the animal and find it lodged against the opposite skin or shoulder or bone, with tissue, hair and muscular substance of all kinds wound around it so that the ball was much larger than the normal size, and thereby created a much larger hole at the exit, and with the same gun and with exactly similar conditions the ball would pass through and tear a larger hole on the opposite side.

Q. Now if a gun such as described here were placed in a man's mouth and exploded, with the character of shell received in evidence, and the man were leaning over the gun when it was exploded, state whether or not the explosion would be apt to force him back so that he would fall backward?

A. I wouldn't know as to that; that would depend on perhaps the position in which he was standing.

Q. Well from—— [179]

The COURT: He said he didn't know.

Q. I don't want you to make a statement you say you don't know. I would rather you say you didn't know if you don't, but I want to make it clear to you.

(Testimony of Clyde L. McNeil.)

Assuming a man like yourself were holding a gun leaning over and putting it in his mouth, putting it in his mouth in this position, or any position in which he would, if he should lose his balance, he would tend to fall forward, would the explosion of the gun in his mouth have a tendency to force him backward?

A. I would think it would, yes sir.

That is my best judgment.

Q. If a gun such as I have described, using the sort of bullet which I have described, were held away from a man's head, being a normal man, 51 years of age, and weighing 175 to 190 pounds, standing five foot ten inches or thereabouts in heighth, if that gun were fired into his face at any distance from his face, would it necessarily leave some visible wound in his face if it struck his face or head at any place?

A. It would at the point of entering, yes sir?

Q. But it would have to be a wound at the point of entry?

The COURT: I think the jury is as able to determine that question as the witness. That is not a matter of expert testimony, so confine the matter to expert knowledge.

The WITNESS: The approximate weight of this gun without any load is seven and one quarter pounds.

In explaining the trigger mechanism of this gun, I will say in the first place there is a block, what

(Testimony of Clyde L. McNeil.)

is known as a block in this gun. The block is the portion of the gun which disappears into the back of the gun as we throw the lever down. [180] If you take that block out you will find it contains what we call a firing pin. That firing pin is about the center of the block and it extends from the back of the block to the point of the block nearest the barrel of the gun. The mechanism which causes that pin to be forced forward into the cap of the shell when the trigger is pulled is such that that trigger is held back by a sear and when the trigger is pulled the sear is released and when the sear is released a spring pushes that firing pin against the cap or primer of the shell. The primer or cap is in the center of the shell, in the face of the shell. After the gun has been discharged, this lever has to be thrown down to enable you to cock the gun again. You throw it down and that cocks the gun. There is an invisible hammer which is cocked by the throwing of this lever forward. When the trigger is pulled the sear is pulled down upon the trigger to the point of releasing, and that releases the hammer, when the trigger is pulled down, and the hammer fires the shell.

Q. Now in the former rifles, the rifles known as 76 models, and later models, where was the hammer on the guns?

Mr. MEYER: Objected to as immaterial.

The COURT: Sustained.

Mr. POORE: We ask for an exception.

(Testimony of Clyde L. McNeil.)

Q. What was the reason for placing the hammer on the inside of the block and inside of the gun rather than permitting it to remain on the outside of the gun?

A. Well I can't answer that question.

Q. What would you say as to the degree of safety, as to the margin, or degree of safety?

The COURT: I suggest he is not qualified as to the degree of safety; he says he doesn't know.

[181]

Mr. POORE: All right, Your Honor. You may cross examine.

Cross Examination by Mr. Meyer.

Q. What would you say is the normal pull on a gun of this kind?

A. Well those guns you will find, there is very few of them have the same pull. Rifles have a pull all the way from three, some up to seven or eight pounds; there is no two have exactly the same pull.

A pull of three or three and a half pounds would be considered an easy pull. The mechanism of a gun sometimes affects the pull. I do not think that non-use of a gun would affect the pull. If I had a gun in stock and it had not been used for two or three years, I do not think that that would affect the pull.

This bullet, defendant's Exhibit 5, weighs 150 grains and they are made by different companies, the Remington and Winchester Western. There

(Testimony of Clyde L. McNeil.)

were two firms or manufacturers making bullets of similar kind during the year 1932 that I know of and they were the Winchester and Remington. There might have been others that I don't know of. I don't know how many stores in the city of Butte, were handling bullets and shells of that kind. I don't want the court and jury to understand that the only bullets purchased by Walter Gamer for this gun were purchased from me. As a matter of fact I don't know whether that is so or not, and don't know from whom he purchased or what kind he purchased. The last bullets I sold to Mr. Gamer for this gun were sold about in the Fall or [182] the year previous to his death. From that time I did not sell him any cartridges or bullets for this gun and I don't know whether he purchased any anywhere else.

In the common vernacular of the streets there are two kinds of bullets that fit into these guns, what is known as soft nose bullets and hard nose bullets. A hard nose bullet will mushroom in metal or something very hard. In game or situations like that as a rule it never does. On striking bone it will deform.

Q. And striking bone what would you say would be the difference between the size or dimension of the soft nose bullet when it mushrooms and the hard nose bullet when it deforms?

A. Why the soft nose bullet will deform a lot more often, fly in particles.

(Testimony of Clyde L. McNeil.)

Q. To what extent, what would be the difference in the size of the hole, and I am speaking of the exit?

A. Well with that the soft point would be much greater than the metal case, I would say ten times greater.

The soft nose when it strikes a hard substance, mushrooms, would leave ten times as large a hole as a hard nose bullet striking the same substance. A soft nose bullet would leave a ragged edge. A hard nose bullet very seldom ever breaks; it would be a more rounding edge. I mean by that that the hole left by a hard nose bullet would be a hole perhaps larger than the entrance, but it would not be as ragged as the soft point.

Q. How much of a hole would the soft nose bullet leave after striking a hard substance, that is going into something else like a ceiling?

A. That varies; I couldn't tell you that because no two bullets would act the same. [183]

As a rule bullets never act the same. I never saw any two the same either in effect or result.

Q. Now assuming that a bullet is discharged at a distance of twelve to fourteen inches from the opened mouth of a person, goes through the mouth and comes out the back of the head and then lodges in a ceiling, and that was a soft nose bullet, what kind of a hole would you expect it to leave in the ceiling, the ceiling being a distance of approximately eight feet nine inches?

(Testimony of Clyde L. McNeil.)

A. That would all depend on the condition of that bullet after it passed out the back of the head; if it was deformed very much it would leave a big hole, if not, it would be small, but considerably larger in diameter than the bullet itself.

Q. Assuming that the bullet was such as defendant's Exhibit 5, how much larger hole would it leave in the ceiling than that would you say?

A. That would vary, maybe four times as large as that and maybe half a dozen times as large.

It is possible that it could be larger than that. If the hole which was found in the ceiling was about the size of a pencil, I couldn't tell whether that would indicate a soft nose bullet or hard nose bullet. That would not have any indication at all to my knowledge.

Q. Suppose the bullet hole in the ceiling was an oblong bullet hole?

A. I don't think anyone could tell what kind of bullet it was.

That would make no impression on me in determining whether it was hard nose or soft nose.

Q. Would the shape of the hole in the ceiling indicate to you the direction in which the bullet was fired, or the direction of [184] the rifle at the time of the discharge?

A. It would show the position if it was against the wall in wood or metal or anything like that.

If it was in plaster I couldn't tell you then and I don't know what the effect of that would be.

(Testimony of Clyde L. McNeil.)

You could tell from the direction of the hole in the ceiling at what angle, if any, the rifle was held at the time of its discharge providing it had not struck any object. Assuming on its flight it had struck a hard object such as a bone, I would say that the hole in the ceiling then would not indicate anything at all.

Q. You would say that the hole in the ceiling would have no significance in determining the angle of the rifle at the time of its discharge, is that correct?

A. It would perhaps give you an idea what it was, but to be exact I could not tell you.

After it strikes an object a bullet is sometimes deflected. If it is a hard object it is generally deflected and liable to go in any direction. A hole in the ceiling being an oblong condition or oblong hole would not indicate anything to me. It would not have any significance in determining the position of the rifle at the time it was discharged. The only thing it would indicate to me would be that the bullet might be deformed. It would not indicate the distance from the object originally struck or first struck that the rifle was held.

Q. So that the hole in the ceiling being made after it struck an intervening object would not aid you in determining the distance at which the rifle was held from the original object struck?

A. I couldn't say that, no sir.

I mean that it would not have any significance in determining that matter. I don't know the amount

(Testimony of Clyde L. McNeil.)

of powder in this [185] shell defendant's Exhibit 5. I have taken those shells apart and have weighed the powder, it varied. As I have been informed by a factory representative the powder is put in there to bring the bullet up to that velocity and different bunches of powder vary and it may take a little more of one kind, a few grains more of one batch of powder than another. That does not depend on the explosive, on the powder. When I receive shipments of these bullets the boxes do not indicate the amount of powder. I know the nature in so far as its explosive quality is concerned, that is in these bullets when I purchase them from the factory. The factory does not write me. When they make these changes they do not inform me of that fact. I don't know the nature of the explosiveness of the powder.

I have identified the powder in these bullets as being smokeless powder and I say it forms gas upon the discharge. The part of this bullet that is actually discharged is the part above the brass part. This here goes into the chamber of your gun, right here, and the part that is discharged is this upper part. The bullet, however, extends down in here to this rim here. In diameter it has exactly the same dimensions. That is the part that is discharged and then the shell is left in the chamber of the gun.

I said that gases form and that gas forms right then, that is when the primer ignites the powder and forms the gas. When the gas is formed it

(Testimony of Clyde L. McNeil.)

creates pressure and burns along that barrel and forms that gas in there; that powder that is burned forming the gas and that gas, or that powder is burned the full length of the barrel, burning from the start or length of that shell and it is the full length of this barrel until the bullet is forced out and after the bullet is forced out the gas strikes [186] the air and there is a general recoil of the gun, what is known as the kick of the gun.

This is a very high powered gun. I cannot tell you in pounds how much of a kick it has, but it is quite a severe kick. When it kicks it draws back. If you hold the gun like this and pull the trigger it would perhaps jerk it out of your hands or throw your hands away back. In other words a person holding this gun in their hand and attempting to put the muzzle in their mouth and then pulling the trigger it is my opinion that the recoil would throw the gun some distance perhaps unless they had a tight hold of the gun, I mean a strong grip on the barrel.

Q. As a matter of fact could you hold a sufficient grip on it and hold the gun, holding it in this position?

A. I would doubt it very much.

Q. What would be the effect of placing this gun on the floor and holding your mouth over it in this fashion and trying to pull the trigger?

A. There would not be any noticeable recoil at all.

(Testimony of Clyde L. McNeil.)

Nothing would happen to the gun by just putting it down there and firing it. I would not think the hold on the gun would be released. I am about 5 foot 8¾ inches tall.

Q. Will you just step over this way. Now will you take hold of the gun. Now will you lean over as near as you can holding that barrel out this way or whatever way you want to try to get your mouth down to the barrel. Can you do it?

A. Yes sir.

Q. Will you reach the trigger. Now you are 5 foot 8¾ inches?

A. Yes sir.

Q. As your height increases is that more difficult?

A. No I wouldn't say it would be. [187]

Q. Would it be less difficult?

A. Yes sir, your reach naturally would be longer.

Q. Well but you got further to go to reach the trigger?

A. Yes that is true.

Q. Now holding it in this position, would you say that anything would happen to the gun?

A. Well not that position either.

Q. I don't mean the way you are now, I mean leaning over with your mouth over the muzzle of the gun. Do I make myself clear?

A. I don't understand what you mean.

Q. Let us get it this way. Now will you bend over. Now what would happen in that way with the discharge of the gun?

A. The gun would fall over on top of you.

(Testimony of Clyde L. McNeil.)

Q. Now I guess you can sit down again. There would be no kick because it is resting on the floor?

A. Yes sir.

But in any position where the gun would not be resting on a solid foundation there would be a recoil or kick and that would be sufficient to throw the gun from you.

The gases as it escapes when it strikes the air it rushes against the air and does not travel far. The distance it would travel would vary from perhaps eight to twelve inches. It is not noticeable as it strikes the air in the daytime but you can notice it at night. When this gun is discharged a fire results and that results after the bullet leaves the muzzle of the gun. There is a flaring fire that is noticeable at night only. That fire is just a flash but it is of sufficient intensity to burn anything with which it comes in contact. I would say it would burn flesh. It is not a very heavy fire. It would have a [188] tendency to sear flesh or tissues. I don't think it would do more than sear or scorch. If it struck a piece of paper it would burn the paper and if dry rags at a close distance it would set them on fire, a distance of three or four inches.

The muzzle velocity of this gun is 2700 feet per second and that is the velocity the bullet travels when it leaves the muzzle of the gun; that is the rate of speed—it travels 2700 feet per second and its muzzle energy is 2430 pounds and that decreases as the bullet attains space.

(Testimony of Clyde L. McNeil.)

I made some experiments for you two years ago on paper, brown paper. I threw that paper away. I have not made any experiments since.

Q. What is the effect of powder marks upon flesh as compared with paper, do you know?

A. It is dark, it is real black on paper and on flesh it is more dark and bluelike.

Q. I mean is the result exactly the same whether you use flesh or paper?

A. I never tried it on flesh and I couldn't tell you.

I really don't know at what distance powder marks would show on flesh. The experiment I made on paper showed that powder burns would appear at a distance of about ten inches. Beyond that the powder marks were very slight if at all. They showed up around about twelve inches but they were very slight and I didn't save any of them.

I told the court and jury I made these experiments at your request. I was also interviewed at the time of the last trial by the defendant. I did not appear as a witness at the last trial of this case on behalf of either party.

This rifle when it is discharged has a sharp noise. [189] The distance that it could be heard depends a whole lot on the atmospherical conditions.

Q. Suppose it was discharged in a crowded clothes closet, a room 2 feet 3½ inches wide by 5 feet 10½ inches long in which there were considerable clothes hanging on the wall and in the rear,

(Testimony of Clyde L. McNeil.)

and the front door was open; and also a window in there. It would make considerable noise?

A. Not outside of there it would not; it would have a tendency to muffle the sound.

If it is fired in close quarters the sound cannot be heard any great distance. I said that the force of the explosion of this gun is terrific. By terrific I mean that it has a very loud report, that is out in the open, a sharp report. The explosion of the gun itself would be terrific; it would be a loud blast and its consequent result would be very devastating and harmful right at the muzzle, and within a short radius around the muzzle, 2 or 3 or 4 inches. The effect of the flash within 4 inches or in so far as anything within 4 inches would be concerned, it would be very destructive in that it would burn. It would burn flesh. The effect of the force of the explosion at that distance would be enough, I think, to knock a person off their balance.

Q. What effect would it have upon the destruction of bone matter? Assuming that you would put the muzzle of this rifle in a man's mouth and pull the trigger what would the effect be as far as his head was concerned?

A. It would be forceful enough to perhaps tear his head off or face, and break the bones in his head or mouth.

I wouldn't say it would tear off the whole top of his head; it would perhaps tear it though. I would say the force [190] would be terrific enough to

(Testimony of Clyde L. McNeil.)

break the jaw bones, and it could break them on both sides.

Q. Now what would the effect be, or would there be any difference in the effect, the extent to which the barrel of the gun is inserted in the mouth; would there be any difference in the effect, in the result?

A. I was presuming that the barrel was placed in the mouth.

Q. That is what I was presuming. You are quite right, that is what my question intended. Would it make any difference if it went to the extreme end, let us assume 2½ inches; would it make any difference whether you put it in beyond the teeth or all the way back inside the teeth?

A. More terrific than if placed between the lips?

Q. If it was placed between the lips it would have to pass the teeth?

A. Yes sir.

I would say that it would not make any difference after you once passed the teeth how far you put the muzzle in the mouth. A bullet discharged from this rifle into the mouth at a distance of 14 inches would not be that destructive. It would be of sufficient force to tear out the back of the head, but as far as the other tissues and parts of the head are concerned, I would feel it would be less likely to destroy any other membranes of the skull. The closer to the mouth, in my opinion, the greater the damage. The muzzle of the gun placed into the

(Testimony of Clyde L. McNeil.)

mouth, that is when it would execute its greatest damage,—when the muzzle is in the mouth. If the muzzle was not in the mouth, if the muzzle was away a distance of 15 to 20 inches from the mouth the force of the blow would be sufficient to blow out the back of the head but the damage to the [191] other parts of the face or skull would be less great than with the muzzle in the mouth.

I spoke of the wound being larger because of substance gathered by the bullet in its journey. That would not make any difference whether you fired at a distance or close angle, it would still pick up this substance as quick as the bullet was deformed and come in contact with bone or anything like that, it would gather substance; coming in contact with bone the bullet would become deformed and would gather these particles and it would not make any difference whether that bullet was fired from a distance or fired in close proximity to the bone; as it struck a bone it would pick up the particles and wrap them around it.

If a man was leaning over the gun the force of the explosion would have a tendency to throw him backwards; if the gun was placed in the mouth it would depend entirely on his position and in addition to that it would depend on the angle of the gun also at which it was held at the time it was discharged.

Q. And the extent to which the man was bending over, that is if he bent over almost at right angles,

(Testimony of Clyde L. McNeil.)

would the tendency of the explosion and force be sufficient to throw him all the way or forward?

A. I would not know in regards to that.

That is something I don't pretend to know anything about.

Redirect Examination by Mr. Poore.

Q. Assuming that this gun were placed in the mouth of a man such as I have described, in a closet such as I have described, the ceiling being between 8 and 9 feet from the floor, and the [192] ball entering the man's mouth and passing through his head at a point somewheres from 4, 5, or 6 feet above the floor, would the deflection of the bullet between the point of leaving the head and entering the ceiling be any considerable amount; would there be any considerable deflection in that distance, a distance of 3 or 4 feet.

A. I would not say it would be 3 or 4 feet.

Q. I say in a distance of 3 or 4 feet would there be much deflection of the bullet?

A. There would be, I would think—I would say there would be some but should not be very great.

Q. Supposing the ball struck a plastered wall, would that be likely to affect the size of the hole of the bullet?

A. Yes it would.

It would be different than if it struck wood. If it struck wood it would make a hole the size of the projectile. If it struck plaster it might be larger depending on the texture of the plaster and also

(Testimony of Clyde L. McNeil.)

depending on whether it struck a lath in its course through the plaster.

These shells are all loaded so the speed of the bullet is uniform; they all go at a uniform speed. They are tested at the factory so that the speed is uniform.

Recross Examination by Mr. Meyer.

Q. With reference to the effect that the bullet would have upon plaster or upo na board, that is purely conjecture on your part is it not?

A. On plaster or board.

Q. Yes, the size of the hole? [193]

A. You take a board and it is more solid; and plaster would be apt to crack and it might be weak or give. It would have a tendency to make a larger hole on plaster than wood.

That is providing that it knocked the plaster off from around the hole. The hole itself would be the same size.

In speaking of the deflection of a bullet, if a bullet strikes a smooth surface it deflects. The distance at which it deflects, there is no set rule by which I can guide my statement. Bullets don't act twice the same way, and even under a given set of circumstances they won't do the same thing.

Witness Excused. [194]

DR. HERBERT D. KISTLER

a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Poore.

The WITNESS: My name is Herbert D. Kistler; I am a physician and surgeon and have been about 30 years. I have been in Montana about 29 years.

I have, in the course of my profession of physician and surgeon, had experience in treating and viewing bullet wounds and the effect of bullet wounds in human bodies and have had considerable experience in that over a period of 30 years. I have had experience in using high-powered rifles for about 30 years and have had experience in hunting and killing large game such as bear, deer, elk, goat and such animals. I have had experience in seeing the effect of high-powered bullets upon such animals.

Q. Doctor, if we assume this state of facts to be true, that a man weighing 180 pounds approximately, standing about 5 foot 10 inches in height and aged about 51 years, well nourished body, being found dead in the bedroom of his residence, lying flat upon his back with his feet extending to approximately the knees in a closet adjoining the bedroom, the balance of his body lying flat upon the bedroom floor, and a high-powered rifle, being a Savage 300 Model 99 Rifle, lying upon his body; with the back of the head in the occipital region of the back of the head being blown out for the

(Testimony of Dr. Herbert D. Kistler.)

diameter of approximately 3½ inches, and without any powder marks or powder burns upon his face; with a wound in his left lip, left upper lip, commencing at a point approximately ⅛ inch from the lefthand corner of his mouth and [195] extending upward towards the nose for approximately a distance of ½ inch, which wound is apparent on the outside and inner side of the lip, but is held together in the middle by muscular tissue and when sewed together by the undertaker fits perfectly so that there is no wrinkling of the skin in the suturing of the wound. And assuming that this man has and wears normally an upper set of false teeth, having no natural teeth in the upper portion of his mouth; assuming that he has 6 lower teeth, being the 6 teeth immediately in the front of his lower jaw over the chin, and to those lower natural teeth is attached a bridgework consisting of 4 teeth on either side and attached to the natural teeth on either side by a clasp, a metal clasp and bound together under the tongue by a metal bridge or strap. And that these lower teeth are turned upward and outward so that they are exposed to view while the body is lying upon the floor; and that the upper bridgework is found upon the floor in the closet undamaged; that the glasses which the man wore are likewise found on the floor in the closet broken in the center, about the point that they cross the bridge of the nose; and assuming that the lower jaw on the right is broken in 3 places; first, one place at about the

(Testimony of Dr. Herbert D. Kistler.)

center of the chin; one place about the line even with the lower part of the right lobe or lower lobe of the ear, and one point about midway between those points, and that these fractures of the jaw are not compound fractures; that there is no visible mark on the outside of the flesh; that there are no powder burns upon the face; that there is no wound, bullet wound in either eye or in the nostrils, or in either ear, or in the chin, or in the throat, or in any part of the face, and the only visible wound is in the back of the head where the back of [196] the head is blown out in approximately a diameter of 3 or 3½ inches, requiring a cone-shaped filler in preparation for burial, approximately 3 or 3½ inches in diameter. If we assume this state of facts to be true, I will ask you first whether or not the wound in the lip would be caused—whether in your judgment the hole in the lip could be caused by a bullet?

A. No sir, I think not.

Q. And then assuming this further state of facts to be true; and if you also further assume that a rifle, 300 caliber Savage Model 99 with the ordinary bullet which that rifle discharges from the ordinary shell which it discharges, were placed inside the mouth of this man and then discharged, would you say the effect of the explosion of this gun inside the mouth would be sufficient to disarrange the lower teeth as I have indicated in my hypothetical question?

A. Yes I think it could.

(Testimony of Dr. Herbert D. Kistler.)

Q. Would you say it would be sufficient to likewise break the jaw as I have indicated in my question?

A. Yes sir.

Q. We will further assume that when that upper plate is refitted in the mouth it fits perfectly; the undertaker fits it back in the mouth of the deceased, the plate fits perfectly; there is no wound on the gums, either on the upper jaw or teeth foundation, nor on the lower face; no indication of any bullet wound or laceration. Now also assume those facts to be true and I will ask you whether or not it would be possible to discharge a bullet into a man's mouth, even assuming the mouth were opened, having the gun any distance away from the mouth, and do that damage to the teeth, the lower teeth and the jaw?

A. No sir I don't think so. [197]

Q. And if the gun were held away from the mouth or away from the face at any distance up to 10 inches, what effect would it have upon the face or upon the tissues of the face?

A. Very little if any except of the bullet itself. There might be effect from the powder, by powder burns, but more likely would not be at a distance of 10 inches. The closer the gun is held to the face the more likely there would be powder burns.

Q. What is the condition of the entrance of a bullet wound, the entrance of a bullet in the fleshy part of a man's body which has not been covered by any covering at all?

(Testimony of Dr. Herbert D. Kistler.)

A. The entrance wound is small, probably only the size of the bullet, with slightly jagged or irregular edges turned inward.

The entrance wound has very little flesh torn away from it. The edges of a wound, either entrance or exit is certainly irregular and ragged and that is caused by taking away some part of the flesh as the ball passes through the flesh.

Q. Now if the muzzle of a gun were held in the mouth, placed in the mouth, and the exit of the bullet was somewhere in the back of the head in the region of the occipital bone, will you describe the portion of the head which the ball would pass through?

A. Well it would pass through the base of the skull which is of irregular consistency, then through the brain tissue itself which is enclosed in a cavity with a small amount of liquid around brain substance; then through the outer heavy dense skull with the scalp over it.

The passing of that bullet through the head and skull as indicated in your question might be apt to deflect the line or course of that bullet, but not very much.

Q. If we assume that the ceiling of the closet in which this shot was fired was approximately 8 feet from the floor of the closet [198] and that the height of the man standing erect was 5 foot 10 inches and that the length of the gun is approximately 43 inches, and that the ball entered the plastered ceil-

(Testimony of Dr. Herbert D. Kistler.)

ing of the closet at a point about one foot from the door entrance to the closet and about midway between the north and south wall of the closet, the closet being in diameter 2 feet 3½ inches; I will ask you what would be your idea of the amount of deflection, if any, of that bullet from the time it passed through the man's head within that range, by the time it struck the plastered ceiling?

A. I don't believe it would be more than 2 or 3 inches at the outside.

Q. Doctor, assuming that this gun were held in the mouth of the man I have described and that holding it in his mouth he was leaning over the gun when the gun was discharged, what would the effect be of the explosion of the gun in his mouth upon his body? I mean with reference to his body falling forward or backward?

A. There would be the force or momentum of that bullet against his body and the effect of direction that it would force the body would depend upon its position.

Q. And if the position is as I have described, which way in your judgment would the body fall?

A. I cannot estimate exactly because I don't know how far forward, or what the balance of his body was.

In my opinion the effect of that explosion and the effect of that bullet would have a tendency to force him in the direction the bullet was going, backward. I have examined the gun and have examined the sight upon the rifle, plaintiff's Exhibit 1.

(Testimony of Dr. Herbert D. Kistler.)

Q. Assuming that rifle in its present condition was placed in [199] a man's mouth and discharged there and the body was found with the wounds which I have described in my questions heretofore, what would you say would be the cause of the tear in his lip which I have described?

A. I don't know; might be the front sight of the rifle.

Q. Would the effect of the explosion within his mouth be apt to stretch the lip to the point of breaking the flesh to that extent?

A. It might break the flesh, and if it were in the lip it would tear out through the edge of the lip and not simply be a hole through the lip, is my impression.

Q. Now this tear I have described is a tear on the inside and the outside but the central portion of it, the middle part is held together by muscular tissue and when sewed up and sutured by the undertaker fits perfectly. Would you say that the force of that explosion could do that?

A. I don't believe so, because the nature of the wound you describe is rather a crushing between the two objects, and if the inside tear and outside——

The COURT: Well assume the lip is torn all the way through and it is held together by a little muscular fiber, then what is the result?

A. It may have been from the explosion or from something within.

(Testimony of Dr. Herbert D. Kistler.)

Q. That is the testimony, tore all the way through and held together by other muscular fiber.

Mr. POORE: I agree that that is the testimony.

The COURT: That is not the question you have been putting. You indicated a small hole.

Mr. POORE: If I did that I didn't intend to; and that is not [200] the impression I wished to have made. I want the record to be correct.

Q. This cut in the lip commenced at a point about one-quarter of an inch from the left hand corner of the mouth and extended forward toward the nose one-half inch in length, a cut on the outside and inside through?

A. Cut through the entire thickness of the lip?

Q. Cut through the entire thickness of the lip but held together by muscular tissue, muscular fiber, what in your opinion, assuming the gun was held in the mouth as I have described, would cause that tear or cut in the lip?

A. Well it might have been the front sight of the gun, the only thing that I could see would make a wound of that kind.

Q. Assuming a ceiling in which the ball entered, after leaving the man's head, was a plastered ceiling, would a plastered ceiling have any effect on the size of a bullet hole in the plaster?

A. The opening in the plaster would depend on the amount of breaking away of the plaster around the bullet entrance, and not simply the size of the bullet.

(Testimony of Dr. Herbert D. Kistler.)

If that ceiling had been wood there would be no breaking away of the material around your bullet hole, so that your hole would be practically the size of the bullet; but in brittle substance like plaster it would break away around the bullet hole and therefore might be any size from the size of a dollar to the size of six inches in diameter.

Cross Examination by Mr. Meyer.

The WITNESS: There is no telling to what extent it would [201] break away and might not break away at all. In the hypothetical question asked me by Mr. Poore, I was told that the rifle was lying upon the body. That did not make any difference in my answer to that question. I don't think it would affect my answer if the testimony was that the rifle was lying alongside of the body, I don't know in what way it would. I did not give it any thought in forming my answer to Mr. Poore's hypothetical question. I was told that the upper plate of false teeth was on the floor alongside of the body. I did not consider that factor in making up my answer or in giving my answer. I have been told that this closet was 5 feet 10½ inches long extending from east to west, and supposing that the upper plate was found in the extreme east corner of that closet, I don't know that it would have any effect upon my answer; don't know that it would have any effect on the questions I answered. I was told that the glasses were found alongside the body and broken on the bridge of the glasses, that was not considered by me in giving my answer. The position of the rifle, where the

(Testimony of Dr. Herbert D. Kistler.)

upper plate was and the condition of the glasses and where they were, were not a factor considered by me in giving my answer.

The breaks in the jaw, these three breaks or fractures described by Mr. Poore, I think they could be caused by force of the explosion. It would make a difference whether the rifle was fired at a distance of 10, 12, or 15 inches from the mouth. These fractures could not be caused if the rifle was fired at that distance unless the bullet struck a bone. A fall might produce the fractures as described in that question.

Q. The body falling a distance and striking on the head could cause fracture of that kind?

A. If the jaw bone were struck directly it might.

[202]

There would be no reason why the right side should be fractured and not the left that I know of.

Q. Either by a fall or explosion of the rifle?

A. No sir.

The fracture being on the right side of the jaw would have no significance at all that I know of. The muzzle of the rifle inside the mouth and then discharged, I think would be sufficient force to disarrange the lower teeth.

Q. At what distance from the mouth would the force be sufficient to disarrange the lower teeth?

A. I think if the muzzle were inside the line of lips and teeth it would have practically no effect on them at all.

(Testimony of Dr. Herbert D. Kistler.)

I have never seen a case of that kind.

Q. So you don't know whether it would or not?

A. My general knowledge of the force of the explosion.

My general knowledge has indicated to me that the result of bullets striking objects differs in all cases. All the authorities say that no one can definitely state what a bullet will do. That is correct. The vagaries of bullets, the course they pursue, the havoc they create are many and varied. It is impossible for a person to say definitely or specifically just what a bullet will do, or what a rifle discharged at a certain distance or distances, what havoc it will create.

A rifle such as defendant's Exhibit A fired at a distance of ten inches may or may not leave powder burns on the face; I think it would at 8 inches, but at 10 inches I am not certain whether it would or not.

Q. Are you definite at all as to whether it would at 12 inches?

A. No sir, because that is approximately the distance at [203] which the burning seems to disappear, or not result in any visible evidence afterwards.

Q. You mean at 10 or 12 inches?

A. Yes sir, sometimes as much as 14 or 15 inches.

Q. Now with reference to the passing of this bullet through the skull, the surface of the skull is smooth?

(Testimony of Dr. Herbert D. Kistler.)

A. Parts of it.

Q. Rather is the back part the occipital?

A. The occipital portion is comparatively smooth.

Q. What is the effect of a bullet on the smooth portion such as the occipital bone?

A. If it is very hard it is deflected; if it is soft practically no deflecting at all.

Q. If the bullet is soft?

A. No, if the object struck is soft.

Q. What is the occipital bone, hard or soft?

A. It is of medium consistency.

Q. Will that deflect a bullet?

A. It will some, yes sir.

Q. And the distance that the bullet will be deflected is entirely problematical?

A. Exactly, that is the exact amount.

Q. So that it cannot be said with any degree of definiteness just how far a bullet will be deflected striking the occipital bone?

A. Not absolutely, no.

Q. Within what distance would you say it could be estimated?

A. I can't answer your question; I don't know what you mean.

Q. You say it could not be definitely stated how far a bullet would be deflected. Do you mean you could tell within 10 inches? [204]

A. I could if I knew the angle at which it struck and the material it struck and the distance away, which would measure your amount of deviation.

(Testimony of Dr. Herbert D. Kistler.)

Those are all factors which must be known to me before I would even attempt to volunteer an opinion as to how far a bullet would be deflected.

I was asked with reference to what would happen to a person leaning over a gun and the gun discharged, such a gun as is this rifle. That would depend, I have already answered, upon the extent to which he is leaning over, the poise of his body. I can not tell you the gravity of a person leaning over, where it extends to, how far he would have to lean over as there is no set rule for that. It is not possible with any degree of definiteness to say just what would happen at any specific angle, a man leaning over a gun such as this rifle and it being discharged, as to what would happen to his body unless you knew the conditions accurately as they existed at the time the rifle was fired.

Re-direct Examination by Mr. Poore.

The WITNESS: If the muzzle of the gun were placed at any point outside of the mouth, away from the lips, and fired in the direction of the lips, or in the direction of the face so that the ball would come out in the occipital region of the head, the back of the head, it would not be possible for that bullet if it did not strike the jaw to break the jawbone. It would not be possible, if that bullet did not strike the lower teeth, to in any way damage the lower teeth. It would not be possible if that bullet did not strike

(Testimony of Dr. Herbert D. Kistler.)

the upper teeth to in any way damage the [205] upper teeth.

In the event the gun were not placed in the mouth, and the mouth were closed, and you had a wound in the back of the head such as described, you must necessarily find some entrance bullet wound on the front part of the face.

Recross Examination by Mr. Meyer.

The WITNESS: The mouth would furnish an entrance. A fall might damage the jaw and cause a fracture and it might break the teeth or injure the plate if the jaw were directly hit. That question brings in the element, in order to make a definite answer, the conditions as they existed, and without a knowledge of that it is impossible to give a definite answer as to what caused it.

Redirect Examination by Mr. Poore.

The WITNESS: If the body were found lying on the back, extended as you have described, with the lower false teeth turned up and outward, I don't think it would be possible for the teeth to be in that position by reason of any fall; I don't know what it would be.

Recross Examination by Mr. Meyer.

The WITNESS: I knew nothing about the dental work of Mr. Gamer's mouth. I did not see the body on the morning of April 10th, and I knew

(Testimony of Dr. Herbert D. Kistler.)

nothing about the conditions as they existed at his home on the morning that he was found.

Witness Excused. [206]

Mr. POORE: We rest, Your Honor.

The COURT: Any rebuttal, Mr. Meyer?

Mr. MEYER: We rest.

Mr. POORE: At this time, Your Honor, we desire to make a motion. (Jury retires.)

Mr. POORE: Motion for directed verdict. Comes now the defendant, New York Life Insurance Company, and respectfully moves the court to direct the jury to return its verdict in favor of the plaintiff and against the defendant for the sum of $10,066.96 (the amount heretofore tendered by defendant to plaintiff and paid into this court by it), and against the plaintiff and in favor of the defendant upon the question of double indemnity, on the grounds and for the reasons:

1st: That plaintiff has failed to show that the death of E. Walter Gamer was caused by any accidental means.

2nd: That the evidence shows that the death of E. Walter Gamer was caused by self-destruction.

3rd: That the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy.

The COURT: The motion is denied.

Mr. POORE: We ask for an exception.

The COURT: Very well, you are entitled to that.

The foregoing is all of the evidence and testimony introduced upon the trial of said cause.

The COURT: So that the attorneys in the case now on trial may know what the law as given by the court may be on the main issues involved in this case it is ordered that plaintiff's requested Instruction No. 1 will be given; plaintiff's requested Instruction Number 2 is refused and will be given by the court as amended by interlineation by striking out eight per cent [207] by striking out the figures 8% and inserting in lieu thereof the figures 6% immediately before the words "per annum" at the conclusion of the instruction. This change is based upon the statute passed and approved on March 14, 1933, appearing in the Session Laws of Montana, of that year at Page 290, which provides that unless there is an express contract in writing fixing a different rate, interest is payable on all monies at the rate of 6% per annum after they become due.

Mr. MEYER: May I state that in that instruction the date was the 15th of April, 1933. The reason that date was inserted was at the last trial it was agreed that that was the date upon which proof of loss was furnished. In the complaint it is alleged and admitted in the answer the correct date is the 8th day of May, 1933, and we find upon further investigation that the 8th day of May, 1933, is the correct date, so I think that that change should be made.

The COURT: Well that amendment to the instruction is made as requested.

The court refuses to give plaintiff's requested instruction Number 3, and gives the same as amended

by the court by striking out the word "eight" immediately after the words "at the rate of" and immediately before the words "per cent per annum" in the 5th line of said instruction and inserting in lieu thereof the word "six"; also by amending the same at the request of the plaintiff to read "the 8th day of May, 1933" instead of April 15th.

The court proposes to give plaintiff's instruction Number 4; proposes to give plaintiff's requested instruction Number 5; proposes to give plaintiff's requested instruction Number 6; and gives defendant's instruction now numbered 8 by the court. [208]

Mr. POORE: Is that the first one?

The COURT: No, not exactly the first one.

Mr. POORE: I have no way of telling how they are numbered.

The COURT: That is the instruction which says, "You are instructed that the Contract of Insurance herein sued on provides,—" and it ends up with, "or whether he committed suicide".

Mr. POORE: Yes, I have it.

The COURT: The court proposes to give defendant's requested instruction now numbered 10 by the court; the court proposes to give defendant's requested instruction now numbered 11 by the court. The court refuses to give defendant's requested instruction now numbered 7 by the court and defendant's requested instruction now numbered 9 by the court.

Mr. POORE: What time do we make a record on the instructions?

The COURT: If you wish to take any exceptions now is the time to take them.

Mr. POORE: We desire to take them Your Honor.

Comes now the defendant in this action and objects to the giving of instruction as numbered 1, by the court upon the following grounds and for the following reasons: 1, that the contract herein sued on provides that the plaintiff may recover double indemnity only in the event of the insured's death resulting directly and independent of all other causes from bodily injury affected solely through external, violent and accidental means, and the complaint in Paragraph 5 thereof alleges that Edward W. Gamer's death resulted directly and independently of all other causes from bodily injury affected solely through external, violent and accidental means. That under the conditions of the policy here referred to the necessity of proving accidental means is, under the law and under the contract, upon the [209] plaintiff, and the burden is not on the defendant under the law to prove that the death occurred by accidental means, and to the extent that the instruction places this burden upon the defendant the said instruction is contrary to law. The defendant further objects to said instruction for the reason that it advises the jury that the presumption of law is that death was not voluntary, and defendant, in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance

of evidence that his death was voluntary. Under all the facts in this case there is no presumption that death was not voluntary; under all the facts in this case the presumption, if any existed, has been removed by the undisputed evidence.

The defendant further objects to this instruction numbered 1, upon the ground that it is in conflict with the court's proposed instruction numbered 11, which advises the jury that the burden of proof is on the plaintiff to show that the death of Edward W. Gamer was caused by external, violent and by accidental means. This instruction numbered 11 states the law and is in direct conflict with instruction numbered 1.

The COURT: Very well we will refuse to give that instruction numbered 11. As a matter of fact in your pleading you admit the death was caused by violent, external means.

Mr. POORE: Yes, but not accidental.

The COURT: Amend the record to show that the court refuses to give defendant's requested instruction numbered 11.

I will state further that the court intends to instruct the jury that, by their admission in the pleading, the defendant has admitted death was caused by violent and external means; and there is simply one question for the jury to determine, and that [210] is whether that death was accidental or with suicidal intent.

Mr. POORE: Defendant objects to proposed instruction numbered 4 on the ground and for the

reason that no evidence of autopsy has been introduced in this cause; that neither the plaintiff nor the defendant made any autopsy upon the body of Edward Walter Gamer, and that the instruction numbered 4 would be confusing to the jury and is not proper under the evidence in the case.

The COURT: Overruled. Note an exception on the part of the defendant also on the objection to the first instruction.

Mr. POORE: Did you pass on the objection to the first instruction?

The COURT: The court overrules the objection.

Mr. POORE: And I ask for an exception.

The COURT: Note an exception.

Mr. POORE: The defendant objects to instruction numbered 6 on the following grounds and for the following reasons: the instruction is too broad in that it embraces the word "doctors"; when there are at least two doctors, namely Dr. McHaffey and Dr. Roberts who testified solely as to matters of fact,—probably not Dr. Roberts solely, I think so however; solely as to matters of fact; and that this instruction in effect advises the jury or would tend to advise the jury that the testimony of Dr. McHaffey should not be given the same weight as the testimony of any other witness who testifies to facts within his knowledge; and advises the jury, or tends to advise the jury, that the testimony of Dr. Roberts should not be given the same weight with the testimony of other witnesses who likewise testified solely to facts within their knowledge; and

said instruction misleads the jury and is prejudicial to the defendant. [211]

Mr. MEYER: At the time this instruction was prepared we had no means of knowing whether the experts to be introduced would be doctors or others skilled in the profession of dentistry or any other profession. I would ask Your Honor's consent that the instruction be amended to eliminate in line 2, the words "or in other words the opinion of the doctors."

The COURT: A safer way would be for the plaintiff to withdraw that instruction. It is covered by the instruction on expert testimony.

Mr. MEYER: I think it is, and with Your Honor's permission, we will withdraw it.

The COURT: Let the record so show.

Mr. POORE: Comes now the defendant and excepts to the refusal of the court to give defendant's Instruction numbered by the court 7.

Comes now the defendant and excepts to the refusal of the court to give defendant's proposed instruction, numbered by the court, 9.

Comes now the defendant and excepts to the refusal of the court to give defendant's instruction, numbered by the court, 11.

Said instructions so proposed to be given by the court and also the instructions tendered and by the court refused are as follows:

INSTRUCTION No. 1.

The defendant in its answer alleges that the death of E. Walter Gamer was caused by suicide.

The burden of proving these allegations, by a preponderance of the evidence, rests on the defendant.

The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide on the part [212] of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence that his death was voluntary.

Given: Baldwin, Judge.

INSTRUCTION No. 2

You are instructed that if you find that the death of Edward W. Gamer was not due to suicide then your verdict should be for the plaintiff and against the defendant, New York Life Insurance Company, a corporation, for the sum of $20,000.00 together with interest thereon from the 8th day of May, 1933, at the rate of 6% per annum.

Given: Baldwin, Judge.

INSTRUCTION No. 3

You are instructed that if you find your verdict in favor of the plaintiff and against the defendant for the double indemnity sum provided for in said policy then you must allow interest on the amount found due the plaintiff at the rate of six per cent per annum from the date plaintiff furnished and

delivered proofs of death of E. Walter Gamer to said defendant, it being admitted herein that such proofs of death were furnished and delivered the defendant New York Life Insurance Company on May 8th, 1933.

Given: Baldwin, Judge.
As amended.

INSTRUCTION No. 4

The jury are instructed that the policy issued by the New York Life Insurance Company upon the life of Edward W. Gamer contained and contains the following provision, "The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law", and in this connection you are instructed that the laws of Montana, do not prohibit an autopsy, neither is the same prohibited by the laws of the United States.

Given: Baldwin, Judge. [213]

INSTRUCTION No. 5

The jury are instructed that in this case evidence has been introduced which is known as expert testimony. You are instructed the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; there is no rule of law which requires the jury to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses. You are to give to their opinion such weight and credit as you shall deem it entitled to after taking into consideration their knowledge

and skill as disclosed in their testimony, and all the other facts and circumstances shown and developed in their testimony.

Given: Baldwin, Judge.

INSTRUCTION No. 6

The court instructs the jury with reference to expert testimony, or, in other words, the opinion of the doctors, that you may take into consideration whether such opinions are supported or refuted by other testimony in the cause. You may also take into consideration the professional learning, skill, ability, and experience of such experts.

(Withdrawn)

INSTRUCTION No. 7

You are instructed to return your verdict in favor of the defendant on the cause of action sued upon by the plaintiff and based upon the accidental death benefit provision contained in the policy of insurance involved in this suit, and to return your verdict in favor of the plaintiff and against the defendant for the sum of $10,066.96 on account of the death benefit provided in said policy.

Refused: Baldwin, Judge. [214]

INSTRUCTION No. 8

You are instructed that the contract of insurance herein sued on provides that defendant, New York Life Insurance Company, agrees to pay to the executrix of the estate of Edward W. Gamer ten thousand dollars upon receipt of due proof of his death within

seven years from the 29th day of December, 1926, and if such death within said period of time resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, the defendant agrees to pay double indemnity, that is twenty thousand dollars, but under the provisions of said contract of insurance double indemnity is not payable if the insured's death resulted from self-destruction, whether sane or insane.

The question for you to determine is, therefore, whether under all the evidence in this case Edward W. Gamer, the insured, died solely as the result of accidental means, or whether he committed suicide.

Given: Baldwin, Judge.

INSTRUCTION No. 9

You are instructed that the burden is upon the plaintiff to prove by a preponderance of the evidence that the insured, Edward W. Gamer, met his death solely by accidental means, and if the plaintiff has failed in this respect plaintiff cannot recover under the double indemnity provisions of the contract of insurance.

Refused: Baldwin, Judge.

INSTRUCTION No. 10

You are instructed that if you find, from a preponderance of the evidence in this case, that Edward W. Gamer, the insured, did not die by accidental means, but that he took his own life, then you are

instructed that the plaintiff cannot recover under the double indemnity provisions of the policy, and can only recover on [215] said policy the sum of $10,000 plus a dividend of $7.54 together with interest on both of said amounts at the rate of four and one-half per cent per annum from April 15th, 1933, to June 5th, 1933, amounting in all to the sum of $10,066.96.

Given: Baldwin, Judge.

INSTRUCTION No. 11

You are instructed that the burden of proof is on the plaintiff to show that the death of Edward W. Gamer was caused by external violent and by accidental means, and if you find from all the evidence that the insured, Edward W. Gamer, intentionally inflicted upon himself the injury which caused his death, then you are instructed that the plaintiff cannot recover the accidental death benefit provided in the policy, and your verdict will be for the defendant and against the plaintiff for such accidental death benefits.

Refused: Baldwin, Judge.

And thereafter and after argument of counsel the court instructed the jury as follows:

COURT'S CHARGE TO THE JURY

Now, gentlemen of the jury, you are about to listen to the fourth lawyer, or fifth, but as counsel has said we each have a duty to perform here. My

duty is to instruct as to the law in the case, and it is your duty as jurors to take the law as I give [216] it to you. Your duty is decide the issue in the case in the light of that law; all questions of fact are for you; the weight that the testimony is to receive, and the credit that it is entitled to, is for you, and the decision in the case is one that nobody but the jury can finally make.

The action here is simply one on contract. The deceased, E. Walter Gamer, paid to the defendant in this case a certain amount of money, and because of that payment the defendant here agreed that under certain conditions it would pay to his executrix, in this case, his wife, a certain amount of money. The New York Life Insurance Company agreed to pay to the executrix of the Estate of Edward W. Gamer, $10,000.00 upon receipt of due proof of his death within 7 years from the 29th day of December, 1926. And further, that if said death within said period of time resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, the defendant agreed to pay double indemnity, that is twice $10,000.00, but under the provisions of said contract of insurance double indemnity is not payable if the insured's death resulted from self-destruction, whether sane or insane. The question for you to determine is, therefore, whether under all the evidence in this case Edward W. Gamer, the insured, died solely as the result of accidental means, or whether he committed suicide.

Boiled down to its final essence, that is the question that you are called upon to decide,—Did Walter Gamer kill himself intentionally, and if Walter Gamer did not kill himself intentionally this woman is entitled to $20,000.00; and if he did intentionally kill himself she is not entitled to any amount in excess of $10,000.00. [217]

If you find from a preponderance of the evidence in this case that Edward W. Gamer, the insured, did not die by accidental means, but that he took his own life, then you are instructed that the plaintiff cannot recover under the double indemnity provisions of the policy, and can only recover on said policy the sum of $10,000.00, plus a dividend of $7.54, together with interest on both of said amounts at the rate of 4½% per annum from April 15th, 1933 to June 5th, 1933, amounting in all to the sum of $10,066.96.

The policy issued by the New York Life Insurance Company upon the life of Edward W. Gamer contained and contains the following provisions, "The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law", and in this connection you are instructed that the laws of Montana do not prohibit an autopsy, neither is the same prohibited by the laws of the United States.

As a result of that provision in the policy the defendant had the right, absolute and unconditionally, to have an autopsy performed on the body of the deceased Gamer with a view of determining

whether the mouth was seared and powder burned as it would have to be if its theory is correct, and for the purpose of determining the course of that bullet through the body of the deceased Gamer. That is a circumstance that you have a right to consider, and, in my view, should consider in the light of the facts as they were presented here, to create the impression in your mind that the plaintiff here was not fair because she would not insist on a tenant allowing them to go into the house which she had rented and in which her husband died, for the purpose of tearing out the ceiling to try to discover the course of the bullet that, in any event, must have been [218] deflected and was deflected as I instruct you as a matter of law if it came into contact with any solid body or smooth surface. Now they had that right, gentlemen of the jury, and they did not see fit to avail themselves of that right. And that is one of the circumstances in the case you have a right to consider.

This case is one of those cases where you have to deal with circumstances entirely. There has been much evidence as to what the effect would be upon the mouth if a gun such as Exhibit 1 was fired in his mouth. The flesh would be seared. Is there any evidence here that the flesh in the mouth of the deceased Gamer was seared? Ask yourselves that question. As I say the facts are for you, and that is a fact that seems to me of some concern and interest in the case. Nobody testified, as I recall it, though the question is for you finally, that there was any

searing or any burning of the membranes in the mouth of Walter Gamer; nobody has testified that there were any abrasions, or cuts, or bruises within the mouth, and all the testimony shows that the initial velocity of the bullet that caused his death was 2700 feet a second, and that the pressure that it carried was 2430 foot pounds. Now ask yourselves, gentlemen, if such a power was exerted in a closed mouth what would be the effect upon the membranes; what would have been the effect on the head generally. But there is nothing here, as I recall the testimony, but the question is finally for you, that there was any abrasion inside the mouth, that there was any searing inside the mouth, that there was any powder burns inside the mouth. Those are circumstances that you should fairly consider in determining whether the contention that the deceased Gamer held that gun inside his mouth and fired it voluntarily, is right or wrong. Those are matters that might have easily been ascertained at the former trial of this case or this trial. [219]

In this case the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight of the evidence is upon the defendant. The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary.

Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-destruction the burden would be upon, and it still is upon the plaintiff in this case, to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of the death was accidental or whether it was suicide. But when the defendant took the position that it takes here it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they avoid a recovery here, to your satisfaction and by a preponderance of the evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had that gun in his hand, proof that it was fired while it was in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the [220] defendant's contention. In addition to that it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life. And that is the question that you are called upon to determine finally.

The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide on part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary. If you find that the death of Edward W. Gamer was not due to suicide then your verdict should be for the plaintiff and against the defendant, New York Life Insurance Company, a corporation, for the sum of $20,000.00 together with interest thereon from the 8th day of May, 1933, at the rate of 6% per annum.

If you find your verdict in favor of the plaintiff and against the defendant for the double indemnity, that is the $20,000.00 sum provided for in said policy, then you must allow interest on the amount found due to the plaintiff at the rate of 6% per annum from the date plaintiff furnished and delivered proofs of death of E. Walter Gamer to said defendant, it being admitted herein that such proofs of death were furnished and delivered to the New York Life Insurance Company on May 8th, 1933.

In this case evidence has been introduced by what are known as experts. You are instructed the ultimate weight to be given to the testimony of experts is a question to be determined by the jury. There is no rule of law which requires the jury to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses. You are to give their testimony such weight and credit as you shall deem [221] it entitled to after taking into consider-

ation their knowledge and skill as disclosed in their testimony, and all the other facts and circumstances shown and developed in their testimony. Which means when put in simple English that you can consider the testimony of an expert as the testimony of anybody else and give it such credit as you think it entitled to.

Now as I told you in the beginning, all questions of fact are entirely for you, but in deciding these questions you must consider and act in the light of certain rules of law which are binding upon you and must be considered by you in determining the weight of testimony. At the outset a witness is presumed to speak the truth. This presumption however may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence. And in determining the weight you may also consider the appearance of the witness on the stand, his manner of testifying, his apparent candor or lack of it, his apparent fairness, and means of knowledge, together with all the other facts and circumstances appearing in the evidence.

I don't feel that there is any witness in this case who had been impeached in any of the ways defined by law. However, that is again a question for you. The witnesses appeared to have testified to the facts as they knew them, and while there are variances, for instance Dr. McHaffey puts the gun in a little different location from that in which it is put by

Malcolm Gillis, the Coroner and Dr. McHaffey and all the others who saw the body prior to the removal of the gun from the hand, agree that the gun was grasped in the left hand of Walter Gamer at the time he fell and was found. There is no contradiction in the testimony that the hand [222] released readily upon pressure being applied to it. Dr. McHaffey testified as to moving the gun slightly while he made an examination of the body. So, while it appears that there may be some discrepancy in the testimony here, it appears that the witnesses came on the scene at different times and after changes had been brought about by the act of others carrying on their work. However, as I say, questions of testimony, and credit that you are to give to witnesses is entirely for your consideration and determination.

Another rule of law which you should bear in mind is that the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case. That rule of law appears to me to have a vital bearing on the issues here to this extent: that in considering whether E. Walter Gamer deliberately destroyed his own life, you will naturally as men, as I see it, and in the light of your experience, inquire for a motive. Self-preservation is said to be the first law of nature. You have seen it in human life and in animal and bird life. No matter what the conditions are most of us carry through and die at the appointed time. But, when men don't do that, and destroy themselves, we naturally seek

for a motive. Now the testimony here, and it is about the only direct testimony we have in the case, is that Mr. and Mrs. Gamer were happily mated, and happily married; that they had a happy home, in which they had a daughter who was the pal of the deceased; that there were no financial difficulties; that there was apparently no motive which would impel any man to destroy himself or take his own life. Now that testimony is absolutely uncontradicted by any other oral testimony in the case, and it is the rule of law that neither court nor jury has [223] a right to disregard uncontradicted credible testimony. Now it is uncontradicted on the record here. The only question for you to determine is, is it credible; is there something in the evidence or lacking from the evidence which causes you to believe that Mr. Gamer had some motive. Now remember gentlemen you must not speculate; you must not guess, and you are not allowed to indulge in conjecture. Your decision of every fact question in this case must be controlled by the law as I give it to you and by the evidence in the case.

The picture drawn in argument about an abundance of suicide is a matter which you have no right to consider because it is not based on testimony. The fact that men may have lost their fortunes and jumped out of a ten-story or twenty-story building in New York business district, referred to in the argument, is not based on any testimony in the case, and no juror has a right to consider any argument or statement made by counsel or the court that is not based upon the testimony given here.

Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you that the presumption is not according to the fact. The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by [224] a weapon in the hands of the deceased, the presumption against suicide still prevails, because if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof.

Now, evidence may be direct, that is the statement of witnesses on the stand who detail an actual occurrence; or it may be indirect. So far as the cir-

cumstances in this case are concerned, so far as the proof is concerned, there is no direct evidence of just how Walter Gamer met his death. So we have to turn to the indirect evidence, to presumptions and inferences. Now a presumption is a deduction that the law expressly requires a juror to make when certain facts are shown for when certain conditions arise. I have given you several presumptions; the presumption that the witness speaks the truth; the presumption that the insured did not intentionally kill himself. Those are presumptions of law. They have the weight and effect of evidence and though they may be controverted by other evidence direct or indirect, unless they are so controverted you are bound to find according to that presumption. Now among the other classes of indirect evidence we have inferences and an inference must be a deduction which the reason of the juror makes from the facts proved, without any express direction of law to that effect. You will notice, gentlemen, there are [225] two elements involved there; it must be a deduction which you make as reasonable men, and it must be based upon something appearing in the evidence in the case. You cannot assume anything or make any inference excepting an assumption or inference based upon some proof in the trial of this case, and the inference must be founded first, on a fact legally proved; and second, on such a deduction from that fact as is warranted by a consideration of the usual propensities or pas-

sions of men, the particular propensities and passions of the person whose act is in question, the course of business and the course of nature.

So while there is no direct rule of law that you must consider, the family relations, the business and social life of the insured in this case, they are the basis upon which a reasonable inference may be drawn. Ask yourself is it reasonable to believe that a man in easy financial circumstances, with an abundance of friends, with a happy and jovial disposition, a lover of work, and a lover of the outside, and with a wife and child whom he idolized, would reasonably do the things the defendant here says Walter Gamer did.

If you decide then that a reasonable man under those conditions would not do as the defendant says Walter Gamer did, then you would naturally conclude that the inference is that the defendant is wrong and that Walter Gamer did not kill himself. Now look into your minds and see what you can find in the case that would justify the belief that he did. Look into the evidence in the case and decide for yourselves what proof there is that that gun was in Walter Gamer's mouth at the time the bullet was discharged. Inquire whether it is not as reasonable that the gun was outside the mouth as in the mouth. [226] There is no showing there was powder mark on the mouth; there is no showing that there was seared tissue in the mouth. So far as inference is concerned there is no showing that that bullet ever went through Walter

Gamer's mouth. No man or woman here testified on the witness stand, if I recall the testimony correctly, that that bullet ever went into Walter Gamer's mouth. Now, maybe my recollection is wrong, but I don't recall such testimony. Everybody seems to assume that it did. But you don't have to act upon the assumption of others. You have a right to draw your own conclusions from the testimony in the case, and it is finally for you to decide whether the defendant has sustained the burden it is required to carry in this case to prevent Mrs. Gamer recovering the $20,000.00 with interest. Now the only thing that they have to base their contention on is circumstances, and the rule of law with reference to the weight and effect of circumstantial evidence is simply this, that a theory cannot be established by circumstantial evidence in this action unless the facts relied on are of such a nature and are so related to each other that it is the only conclusion that can fairly be drawn or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory.

Now, as I told you before, the burden is upon the defendant here to prove its theory, that is that Walter Gamer deliberately destroyed himself. There is nothing but circumstantial evidence in this case to prove that theory. And if that evidence is not of a kind, character and of such a nature, and the facts

detailed in proving the circumstances are not so related to each other that the suicide theory is [227] is the only reasonable conclusion that can be drawn in this case from the facts in evidence you must find for the plaintiff here.

Now, counsel has commented upon the effect, or rather the course of this bullet. He has stated as a fact, though I recall no evidence justifying the statement, that that bullet would only diverge from its course a little bit. He didn't tell you how much. The testimony of all the witnesses whose testimony I recall on that question, its weight or effect is again for you, and I might have forgotten some of it, is that you cannot tell what will happen when a bullet strikes a smooth surface or hard substance.

The law as stated by the Circuit Court of Appeals, in this case which is binding here, with reference to similar conditions, is that where there is no testimony with reference to the matter, that is with reference to what the effect of coming in contact with a body would be upon a bullet, but we can take judicial notice of the fact. Now that is a matter that the court takes knowledge, or notice of, and instructs you that as a matter of law: "We can take judicial notice of the fact that a rifle ball striking a smooth surface at a slight angle would ricochet," that is fly off at an angle, "And that this ricochet will not be in the same plane in which the bullet was moving at the time it struck the smooth surface, but will divert therefrom at an angle, due to

the fact that the rifle bullet is not only moving forward but is rapidly revolving on its longitudinal axis."

So, gentlemen of the jury, the court becomes an expert on bullets and firearms, and the court tells you that in the light of common experience a bullet striking a smooth or a [228] hard surface will be deflected from its course and, so far as I recall, there is not a particle of testimony in this case of expert as to what angle it will go in, how far it will diverge from the direct line; and, as I recall the testimony, though that again is for you, the witness who did testify on that question said it was an uncertain and speculative matter that no man could determine. Now ask yourself whether the skull of a human being and particularly of E. Walter Gamer would not be such a surface as to cause a bullet to deflect and go at an unknown angle. That is for you to decide.

Now, gentlemen, in conclusion the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that E. Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that E. Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00 with interest.

The jury will retire in charge of the bailiff.

Immediately after the court had directed the jury to retire in charge of the bailiff, and as the jury was leaving the box, J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exception to the charge of the court. Mr. Poore answered, "Yes, Your Honor" and immediately and while the jury was retiring proceeded to and did commence to dictate into the record but did not conclude the following exceptions to the charge of the court:

Mr. POORE: Comes now the defendant in this cause and reiterates and re-asserts the same objections to the instructions given which it heretofore asserted in the initial partial settlement of the instructions as shown by the record. And the defendant now, in addition, makes the following objections and takes the following exceptions to the instructions of the court as given to the jury:

The defendant excepts to the charge of the court that the burden is upon the defendant to prove that Walter Gamer [229] intentionally took his own life, and that his death was not the result of accident or accidental means.

The contract of insurance specifically provides that the defendant company shall be liable for double indemnity only in the event the death should be caused from bodily injury effected, solely through external, violent and accidental means. And the burden is upon the plaintiff to prove that death was caused by accidental means within the meaning of

said contract of insurance, and that this embraces the fact that Walter Gamer did not take his own life and did not commit suicide whether then sane or insane, or whether then being capable, as a matter of law, of forming a fixed intent by reasoning or not. That the question of suicide in this case is not, as a matter of law, a question of defense, but is a question of substantial right to be first established by the plaintiff before any recovery may be obtained by the plaintiff, and that the burden at no time shifts from the plaintiff to the defendant, but is upon the plaintiff throughout the entire case to prove by a preponderance of the evidence that Walter Gamer's death occurred through accidental means, whether sane or insane.

The defendant objects to the charge and instructions of the court that there is a presumption in this case that Walter Gamer did not take his own life or did not commit suicide, for that under the facts in this case undisputed, the evidence will, as a matter of law, sustain but one conclusion and that is that Walter Gamer's death was not the result of accident but was the result of self-destruction.

The defendant objects and excepts to the charge of the court to the effect that the defendant could, and under the [230] charge of the court the jury may be led to believe that the defendant should, as a matter of law, have had an autopsy performed upon the body of Walter Gamer at some time prior to this trial. The evidence shows that Walter Gam-

er's body was interred in the cemetery at Helena, on the 12th day of April, 1933, and the pleadings admit that the claim for double indemnity was made on the 8th day of May, 1933, and from said instruction the jury may be led, and the defendant believes from the instruction that it would be led, to believe that unless this evidence was produced there is no evidence to show that the gun was actually in the mouth of Walter Gamer at the time the shot was fired.

The COURT: Where is the evidence that tends to show it was in his mouth?

Mr. POORE: The following evidence tends to show and does show that the gun was in the mouth of E. Walter Gamer at the time the shot was fired, namely: that the exit of the bullet was in the back of the head of Walter Gamer in the region of the occipital bone; that the head was there blown out; there is no bullet wound in the face, or nostrils, or eyes, or mouth, or chin, or any other part of the head of E. Walter Gamer than the bullet wound appearing at the exit. That the lower false denture in the mouth of E. Walter Gamer was turned up and outward by a force of some kind exerted thereon; that there was no wound, bullet wound of any kind in the gums, either upper or lower. That the teeth were not broken by any exterior force in any way. And that no other inference can be logically or reasonably deduced from these facts than that the gun was in the mouth of E. Walter Gamer at the time the shot was fired. [231]

The defendant further objects to the charge of the court in that the court in effect tells the jury that the only defense which the defendant may establish from the evidence is a defense based upon an inference or presumption and leads the jury to believe from said charge that there is doubt if any such defense could be based on such inference, or presumption, and in effect directs the jury to return a verdict in favor of the plaintiff.

The defendant objects to the charge of the court in advising the jury that the burden is upon the defendant to show that E. Walter Gamer deliberately and intentionally took his own life; and in this connection states that the charge as given would lead the jury to believe that he must have been in such a state of mind that he could form an intent and that this may negative the contractional right of suicide whether sane or insane.

The defendant objects to the court advising the jury as a matter of law that a bullet will ricochet or glance in every instance, or that it did glance or ricochet in this instance, for that there is no law which will govern in all cases or in this case, as to whether a bullet would glance or ricochet or not. And objects and excepts to the instruction of the court that there is no evidence as to the extent to which that bullet might have been diverted from its true course by reason of passing through the head of Walter Gamer, because the witness, Dr. Kistler, testified that, in his opinion as an expert, it would not exceed 3 or 4 inches.

The COURT: The record may show the court was simply reading from the Circuit Court decision in this case, which on and during this trial is assumed to be the law. [232]

Mr. POORE: The defendant objects to the statement as read from the Circuit Court of Appeals decision for the reason above stated, and says that such statement is not a proper statement to give to the jury under the circumstances in this case, and is not a correct statement of the law in this case as applied to the facts in the case as now in evidence, and is prejudicial to the rights of the defendant.

The defendant excepts and objects to the statement of the court in its charge that there is no evidence, or it is doubtful if there is any evidence, sufficient to sustain a verdict that E. Walter Gamer took his own life, and if any such exists it must be based upon an inference or presumption, which inference or presumption was stated by the court, and that such statement is not a correct statement of law and is prejudicial to the rights of the defendant.

The defendant excepts to the instruction of the court that defendant must show motive. The defendant further objects to the charge of the court that if an autopsy had been made that it would have shown any particular condition or state of facts; and that the court has no right to advise the jury that if an autopsy had been made it would have shown any particular condition or state of facts as being purely a matter or conjecture and assumption and not based upon any evidence in the case before the jury.

The defendant further objects to the charge of the court, that there was no burning or searing of the back of the mouth, of that there was any evidence of any burning or searing, as prejudicial to the rights of the defendant in this case.

The COURT: The exceptions will be noted. Has plaintiff any exceptions to the charge? [233]

Mr. MEYER: None, Your Honor.

Mr. POORE: We also ask that these exceptions embrace the specific exceptions heretofore made to the instructions.

The COURT: Very well, the exceptions will be noted. The court will stand in recess.

That thereafter the jury retired to consider of their verdict, and subsequently—at 8:10 p. m. on November 14, 1935—returned into court with their verdict, which said verdict is as follows:

[Title of Court and Cause.]

We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant for the sum of $20,000.00 with interest thereon from the 8th day of May, A. D. 1933, at the rate of 6% per annum.

TROY EVANS
Foreman.

[Filed November 14, 1935].

That thereafter and on the 16th day of November, 1935, upon the application of counsel for the defendant, the court by order duly and regularly signed, granted the defendant sixty days additional time within which to prepare and serve its bill of exceptions herein, said order being as follows:

[Title of Court and Cause.]

"Order extending time to defendant within which to prepare and serve Bill of Exceptions of the proceedings had at the trial of the above entitled action.

Application being made by the defendant in the above entitled action to the above entitled court for an extension of sixty days in addition to the ten days provided and allowed by the rules of said court within which to prepare and serve its proposed Bill of [234] Exceptions of all the proceedings had at the trial of the above entitled action on November 11-14, 1935, and the plaintiff having consented in writing on file in said action to the granting of said extension.

It is therefore ordered, and this does order that the above named defendant be and is hereby granted sixty days in addition to the ten days provided and allowed by the rules of this court within which to prepare and serve its proposed Bill of Exceptions of all the proceedings had at the trial of the above entitled action on November 11-14, 1935.

Dated this 16th day of November, 1935.

JAMES H. BALDWIN,

Judge.

Thereafter and on December 10th, 1935, defendant served and filed its Petition for a New Trial in the above entitled cause which, omitting the title of court and cause is as follows:

PETITION FOR NEW TRIAL

To the Honorable The District Court of the United States for the District of Montana, Butte Division:

Comes now the defendant, New York Life Insurance Company, and petitions this Honorable Court to grant and order a new trial of the above entitled action for the following causes materially affecting the substantial rights of this defendant:

1. Irregularity in the proceedings of the court by which this defendant was prevented from having a fair trial.

2. Orders of the court by which this defendant was prevented from having a fair trial.

3. Abuse of discretion by the court by which this defendant was prevented from having a fair trial. [235]

4. Insufficiency of the evidence to justify the verdict. The evidence is insufficient in the following particulars: There is no evidence that the death of the insured, E. Walter Gamer, resulted from accidental means. There is no evidence to support the verdict for double indemnity. The evidence, taken as a whole, shows that insured's death resulted from self-destruction, whether sane or insane. The evidence shows that the muzzle of the gun was in the mouth of the insured at the time it was dis-

charged, and that no other person than said insured placed it there, and that the placing of the muzzle of the gun in the mouth of the insured and discharging the gun could not have been, and there is no evidence that it was, the result of accident. Under all the evidence, there is no presumption against self-destruction, or that death was accidental. The evidence is alone consistent with the theory of suicide, and inconsistent with any reasonable hypothesis that death was effected by accidental means. All the facts shown by the evidence indicate suicide, and there is nothing in the evidence reasonably having a substantial tendency to show that death might have occurred in any other way. The evidence is undisputed as to the physical facts connected with the death of the insured, and these facts are alone consistent with the hypothesis of suicide and inconsistent with the hypothesis of accident. There is no evidence that death was effected by accidental means, or that the gun was discharged by any agency, force or cause other than by the act of the insured. There is no evidence having any tendency to prove that the gun was fired as the result of the trigger accidentally coming in contact with another object of sufficient force to produce that result. The evidence is [236] such that none of it has a tendency to prove that the death of insured was effected by accidental means. The verdict of the jury is based wholly upon speculation, conjecture and surmise that the death of insured was caused by accidental means. The record contains such a preponderance

of evidence tending to prove suicide that the verdict is without substantial basis for its support. The facts in the case are of such character that different minds can only draw one reasonable conclusion therefrom, and that of death by suicide. The location of the wound causing death; the absence of powder marks or burns; the absence of any bullet wound in the face or head of the insured other than the wound of exit; the absence of injury to the gums of the insured; the inversion and protrusion of his lower teeth; the fractures in his lower jaw; the position of the body when found; the position of the rifle on the body when found, and its being clasped in the left hand of the insured just below the muzzle; the location of the hole in the ceiling of the closet; the fact that the insured was right-handed; the presence of only one shell in the gun; the fact that he was careful and kept his loaded shells in a drawer in his bedroom away from the gun; the moist cigar stub on the window sill of the clothes closet; the acts necessary to fire the rifle; and the absence of any evidence tending to show the firing of the rifle being due to any force or agency other than that of the insured,—and all of which facts are wholly without contradiction in the evidence,—exclude any reasonable hypothesis but that of suicide.

5. Errors in law occurring at the trial.

The following particular errors occurring at the trial are [237] relied upon;

(a) The court erred in denying this defendant's motion for a directed verdict.

(b) The court erred in instructing the jury that defendant had the right and opportunity to examine Gamer's body and to make an autopsy; that the jury should consider the fact that this was not done by defendant; that the evidence of defendant's efforts to obtain a survey of the course of the bullet through the ceiling of the clothes closet was to seek to create the impression in the jury's mind that plaintiff was not fair because she would not insist on a tenant allowing defendant to enter the house and open the ceiling to try to discover the course of the bullet, and in telling the jury that in any event the course of the bullet would have been deflected.

The court erred in instructing the jury that there is no evidence that the flesh in Gamer's mouth was seared or burned, and that there were no cuts, abrasions or bruises within the mouth, and that these are circumstances for the jury to consider in determining whether Gamer held the gun in his mouth and fired it voluntarily, and that these are matters that might easily have been ascertained at the former trial and this trial.

The court erred in instructing the jury that the burden of proving Gamer's death was caused by suicide, and that he killed himself, was on defendant.

The court erred in instructing the jury that the presumption of law is that Gamer's death was not voluntary, and that the burden is on the defendant to overcome this presumption.

The court erred in instructing the jury that proof that Gamer had the gun in his hand; proof that it

was fired while [238] in his hand; proof that as a result of the firing of the rifle he died, is not sufficient, but defendant must show in addition that at that moment Walter Gamer intended that the bullet fired from that gun should take his life.

The court erred in instructing the jury that the presumption of law is that the death of Gamer was not voluntary; that defendant has the burden of sustaining the issue of suicide, and must overcome this presumption and satisfy the jury by a preponderance of evidence that the death of Gamer was voluntary.

The court erred in instructing the jury that in considering whether Gamer deliberately destroyed his own life, they should inquire for a motive; that the only direct testimony in the case was that Gamer was happily married, with a happy home; that his daughter was his pal; that there were no financial difficulties, and there was apparently no motive to take his life, and that this testimony is uncontradicted; that the presumption is he did not take his life, and this presumption has the force and effect of evidence, and is binding on the jury until overcome by evidence satisfying the minds of the jury; that the only possible defense is for defendant to show that Gamer deliberately formed the intention to kill himself and did so; and in advising the jury to ask themselves: "Is it reasonable to believe that a man in easy financial circumstances, with an abundance of friends, with a happy and jovial disposition, a lover of work, and a lover of

the outside, and with a wife and child whom he idolized, would reasonably do the things the defendant here says Walter Gamer did?" And also erred in instructing the jury that if a reasonable man under such circumstances would not commit suicide, then the [239] jury should naturally conclude and the inference is that the defendant is wrong and that Gamer did not kill himself.

The court erred in instructing the jury that there is no evidence that the bullet passed through Gamer's mouth.

The court erred in instructing the jury that they had a right to control their own conclusions from the testimony in the case, and in deciding whether defendant has sustained the burden it is required to sustain to prevent Mrs. Gamer recovering $20,000 with interest.

The court erred in instructing the jury that the only thing defendant has to base its contention on are circumstances.

The court erred in instructing the jury that the burden is upon defendant to prove its theory that Walter Gamer deliberately destroyed himself; that there is nothing but circumstantial evidence in the case to prove that theory; that if the evidence is not of a kind, character and nature, and the facts detailed in proving the circumstances are not so related to each other that the suicide theory is the only reasonable conclusion that can be drawn from the facts in evidence, the jury must find for plaintiff.

The court erred in instructing the jury that the court takes judicial notice of the fact, and instructing the jury as a matter of fact and law, that a rifle ball striking a smooth surface at a slight angle will ricochet and fly off at an angle, and that there is not a particle of testimony in the case as to what angle it will take.

That the court's charge as a whole was prejudicial to the defendant; that it was partial to the plaintiff and biased against the defendant, and practically amounted to an instructed verdict for plaintiff upon the issue of double indemnity; [240] that the charge of the court to the jury was not a fair and impartial summation of the issues of fact and law involved in the action, and that it was of a nature and character to give, and that it did give to the jury, the impression that in the court's opinion the plaintiff should recover.

And the court erred in indicating to the jury the fact that this case had been reviewed by the Circuit Court of Appeals, and in directing the attention of the jury to the comment of that court respecting the absence of evidence showing the effect on a bullet coming in contact with a smooth surface at a slight angle, and in reading to the jury from said court's decision in this case.

The court erred in refusing defendant's requested instructions numbered 7 and 9 and 11.

This application is made and based upon the pleadings and papers on file and upon the minutes of the court which, for this purpose shall include

not only the Clerk's minutes, and any notes or memoranda which may have been kept by the Judge, but also the reporter's transcript of his shorthand notes.

Dated this 10th day of December, A. D. 1935.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant.

Service of the foregoing petition for a new trial is admitted and copy thereof received this 10th day of December, 1935.

WILLIAM MEYER
C. J. CHRISTIAN
Attorneys for Plaintiff.

[Filed Dec. 10, 1935)

Said Petition for a New Trial was by the Court set for hearing on January 3, 1936, at the hour of 10 o'clock A. M. [241] and came regularly on for hearing before the Court at said time.

Each cause specified in the Petition for New Trial as a ground therefor was argued to the court by counsel for defendant; and, when the exceptions to the court's charge to the jury were reached in the argument, Mr. Meyer, one of counsel for the plaintiff, objected to the Court considering the instructions to the jury and the exceptions thereto taken by the defendant, for the reason that the exceptions were not taken in the presence of the jury, which statement was in open court disputed by counsel for

defendant. The Court did not rule upon the exception of Mr. Meyer, and permitted counsel for defendant to present their exceptions to the instructions as set forth in the Petition for New Trial, and thereupon, at the close of the argument of counsel, it was by the court

Ordered that defendant's petition for a new trial herein should be and is denied, to which ruling of the court defendant duly excepted, and the exception of defendant to the order of the court was by the court directed to be duly noted.

Thereupon, the Court ordered that the record show that by agreement of counsel, expressed in open court, defendant is granted to and including January 20, 1936, in which to prepare, serve and file with the clerk its proposed bill of exceptions to the order of the court denying its motion for a new trial.

And now, within the time allowed by law, and as granted by the court, the defendant presents this, its proposed Bill of Exceptions of all the proceedings had at the trial of the above entitled action and upon defendant's Petition for a New Trial, and asks that the same may be signed, settled and allowed as true and correct.

Dated this 13th day of January, A. D., 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant. [242]

Service of the foregoing proposed Bill of Exceptions is admitted and copy thereof received this 13th day of January, A. D., 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff.

United States of America,
State of Montana,
County of Silver Bow.—ss.

I, JAMES H. BALDWIN, Judge of the District Court of the United States for the District of Montana, who presided at the trial of the foregoing entitled action, and who heard and passed upon the Petition for a New Trial of said action, do hereby Certify: That said Bill of Exceptions is full, true and correct, and contains all of the testimony and evidence offered and received upon said trial, and all of the testimony and evidence offered by the parties and excluded by the court, and all exceptions taken upon said trial and all rulings by the court thereon and during said trial, and all instructions given by the court to the jury and all exceptions taken thereto; and all exceptions taken by either party upon the presentation of Defendant's Petition for a New Trial, and all rulings of the court thereon; and also the Order of the Court denying the Petition for a New Trial and the exception of defendant thereto; and that there is incorporated in said Bill of Ex-

ceptions all rulings, and orders made by the court, and all exceptions thereto, and all proceedings had in the cause against [243] either of the parties, together with the objections and exceptions thereto made and reserved; and also the Petition for New Trial, and the rulings thereon and thereat; with all matters and proceedings had on the said trial; and the same is hereby settled and by me settled, signed and allowed as full, true and correct at the date hereof.

Done and dated this 31 day of January A. D., 1936.

JAMES H. BALDWIN
Judge.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [244]

Thereafter, on January 31, 1936, defendant's Petition for Allowance of Appeal was duly filed herein, in the words and figures following, to-wit: [245]

[Title of Court and Cause—No. 847.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable James H. Baldwin, Judge of the District Court of the United States for the District of Montana.

Comes now the defendant New York Life Insurance Company conceiving itself aggrieved by the judgment entered in the above entitled Court and cause on November 18, 1935, and does hereby appeal

from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith; and defendant and petitioner herein, New York Life Insurance Company, prays that an appeal may be allowed to it from the District Court of the United States for the District of Montana, to the said United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and said defendant, New York Life Insurance Company, your petitioner herein, further prays that a proper Order fixing the amount of security, which said defendant shall [246] give and furnish upon such appeal, be made.

Dated January 31, 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant New York Life Insurance Company.

Service of the within and foregoing Petition for Allowance of Appeal acknowledged and copy thereof received this 31 day of January, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [247]

And also on said January 31, 1936, the assignment of errors of defendant New York Life Insurance Company was duly filed herein, in words and figures following, to-wit: [248]

[Title of Court and Cause—No. 847.]

ASSIGNMENT OF ERRORS.

Comes now the defendant, New York Life Insurance Company, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of the above entitled court, entered in the above entitled court and cause on the 18th day of November, 1935, and says that said judgment is erroneous and unjust to this defendant, because:

1.

The Court erred in overruling and denying the motion of defendant New York Life Insurance Company for a directed verdict against plaintiff and in favor of defendant upon the question of double indemnity, for that the plaintiff failed to show that the death of E. Walter Gamer was caused by any accidental means; that the evidence shows that the death of E. Walter Gamer was caused by self-destruction, and the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy.

The evidence is insufficient in the following particulars:

There is no evidence that the death of the insured, E. Walter Gamer, resulted from accidental means. There is no evidence to [249] support the verdict for double indemnity. The evidence, taken as a whole, shows that insured's death resulted from self-destruction, whether sane or insane. The evidence shows that the muzzle of the gun was in the mouth of the insured at the time it was discharged, and that no other person than said insured placed it there, and that the placing of the muzzle of the gun in the mouth of the insured and discharging the gun could not have been, and there is no evidence that it was, the result of accident. Under all the evidence, there is no presumption against self-destruction, or that death was accidental. The evidence is alone consistent with the theory of suicide, and inconsistent with any reasonable hypothesis that death was effected by accidental means. All the facts shown by the evidence indicate suicide, and there is nothing in the evidence reasonably having a substantial tendency to show that death might have occurred in any other way. The evidence is undisputed as to the physical facts connected with the death of the insured, and these facts are alone consistent with the hypothesis of suicide and inconsistent with the hypothesis of accident. There is no evidence that the gun was discharged by any agency, force or cause other than by the act of the insured. There is no evidence having any tendency to prove that the gun was fired as the result of the trigger accidentally coming in contact with another object

of sufficient force to produce that result. The evidence is such that none of it has a tendency to prove that the death of insured was effected by accidental means. The facts in the case are of such a character that different minds can only draw one reasonable conclusion therefrom, and that of death by suicide. The location of the wound causing death; the absence of powder marks or burns; the absence of any bullet wound in the face or head of the insured other than the wound of exit; the absence of injury to the gums of the insured; the inversion and protrusion of his lower teeth; the fractures in his lower jaw; the position of [250] the body when found; the position of the rifle on the body when found, and its being clasped in the left hand of the insured just below the muzzle; the location of the hole in the ceiling of the closet; the fact that the insured was right-handed; the presence of only one shell in the gun; the fact that insured was careful and kept his loaded shells in a drawer in his bedroom away from the gun; the moist cigar stub on the window sill of the clothes closet; the acts necessary to fire the rifle, and the absence of any evidence tending to show the firing of the rifle was due to any force or agency other than that of the insured, —all of which facts are wholly without contradiction in the record,—exclude any reasonable hypothesis but that of suicide.

—2—

The Court erred in instructing the jury as follows:

"The policy issued by the New York Life Insurance Company upon the life of Edward W. Gamer contained and contains the following provisions, 'The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law,' and in this connection you are instructed that the laws of Montana do not prohibit an autopsy, neither is the same prohibited by the laws of the United States. As a result of that provision in the policy, the defendant had the right, absolute and unconditionally, to have an autopsy performed on the body of the deceased Gamer with a view of determining whether the mouth was seared and powder-burned as it would have to be if its theory is correct, and for the purpose of determining the course of that bullet through the body of the deceased Gamer. That is a circumstance that you have a right to consider, and, in my view, should consider in the light of the facts as they were presented here, and not to seek to create the impression in your mind that the plaintiff here was not fair because she would not insist on a tenant allowing them to go into the house which she had rented and in which her husband died, for the purpose of tearing out the [251] ceiling to try to discover the course of the bullet that, in any event, must have been deflected and was deflected as I

instruct you as a matter of law if it came into contact with any solid body or smooth surface. Now, they had that right, gentlemen of the jury, and they did not see fit to avail themselves of that right. And that is one of the circumstances in the case you have a right to consider."

—3—

The Court erred in instructing the jury as follows:

"This case is one of those cases where you have to deal with circumstances entirely. There has been much evidence as to what the effect would be upon the mouth if a gun such as exhibit 1 was fired in his mouth. The flesh would be seared. Is there any evidence here that the flesh in the mouth of the deceased Gamer was seared? Ask yourselves that question. As I say, the facts are for you, and that is a fact that seems to me to be of some concern and interest in the case. Nobody testified, as I recall it, though the question is for you finally, that there was any searing or any burning of the membranes in the mouth of Walter Gamer; nobody has testified that there were any abrasions, or cuts, or bruises within the mouth, and all the testimony shows that the initial velocity of the bullet that caused his death was 2700 feet a second, and that the pressure that it carried was 2430 foot pounds. Now, ask yourselves, gentlemen, if such a power was exerted in a closed mouth what would be the effect upon the membranes; what would have been

the effect on the head generally? But there is nothing here, as I recall the testimony, but the question is finally for you, that there was any abrasion inside the mouth; that there was any searing inside the mouth; that there was any powder burns inside the mouth. Those are circumstances that you should fairly consider in determining whether the contention that the deceased Gamer held that gun inside his mouth and fired it voluntarily, is right or wrong. [252] Those are matters that might easily have been ascertained at the former trial of this case or this trial."

—4—

The Court erred in instructing the jury as follows:

"In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight, of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary.

—5—

The Court erred in instructing the jury as follows:

"Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-

destruction, the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of the death was accidental, or whether it was suicide. But when the defendant took the position that it takes here, it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they avoid a recovery here, to your satisfaction and by a preponderance of the evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had that gun in his hand, proof that it [253] was fired while it was in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the defendant's contention. In addition to that it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life."

—6—

The Court erred in instructing the jury as follows:

"The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary."

—7—

The Court erred in instructing the jury as follows:

"In considering whether E. Walter Gamer deliberately destroyed his own life, you will naturally as men, as I see it, and in the light of your experience, inquire for a motive. Self-preservation is said to be the first law of nature. You have seen it in human life and in animal and bird life. No matter what the conditions are most of us carry through and die at the appointed time. But, when men don't do that, and destroy themselves, we naturally seek for a motive. Now the testimony here, and it is about the only direct testimony we have in the case, is that Mr. and Mrs. Gamer were happily mated, and happily married; that they had a happy home, in which they had a daughter who was the pal of the deceased; that there were no financial difficulties; that there was apparently no motive which would impel any man to destroy himself or take his own life. Now that testimony is absolutely

uncontradicted by any other oral testimony in the case, and it is the rule of law that neither the court nor jury has a right to disregard uncontradicted credible testimony. Now it is uncontradicted on the record here. The only question for you to determine is, is it credible; is there [254] something in the evidence or lacking from the evidence which causes you to believe that Mr. Gamer had some motive. Now remember gentlemen you must not speculate; you must not guess, and you are not allowed to indulge in conjecture. Your decision of every fact question in this case must be controlled by the law as I give it to you and by the evidence in the case."

—8—

The Court erred in instructing the jury as follows:

"Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning, the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you, that the presumption is not according to the fact. The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by a weapon in the hands

of the deceased, mind, the presumption against suicide still prevails, because if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it,—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof."

—9—

The Court erred in instructing the jury as follows:

"While there is no direct rule of law that you must consider the family relations, the business and social life of the [255] insured in this case, they are the basis upon which a reasonable inference may be drawn. Ask yourself, is it reasonable to believe that a man in easy financial circumstances, with an abundance of friends, with a happy and jovial disposition, a lover of work, and a lover of the outside, and with a wife and child whom he idolized, would reasonably do the things the defendant here says Walter Gamer did? If you decide then that a reasonable man under those circumstances would not do as the defendant says Walter Gamer did, then you would naturally conclude that the in-

ference is that the defendant is wrong and that Walter Gamer did not kill himself. Now, look into your minds and see what you can find in the case that would justify the belief that he did. Look into the evidence in the case and decide for yourselves what proof there is that that gun was in Walter Gamer's mouth at the time the bullet was discharged. Inquire whether it is not as reasonable that the gun was outside the mouth as in the mouth. There is no showing there was powder mark on the mouth; there is no showing that there was seared tissue in the mouth. So far as inference is concerned, there is no showing that that bullet ever went through Walter Gamer's mouth. No man or woman here testified on the witness stand, if I recall the testimony correctly, that that bullet ever went into Walter Gamer's mouth. Now, may be my recollection is wrong, but I don't recall such testimony. Everybody seems to assume that it did. But you don't have to act on the assumption of others. You have a right to draw your own conclusions from the testimony in the case, and it is finally for you to decide whether the defendant has sustained the burden it is required to carry in this case to prevent Mrs. Gamer recovering the $20,000 with interest. Now, the only thing that they have to base their contention on is circumstances, and the rule of law with reference to the weight and effect of circumstantial evidence is simply this, that a theory cannot be established by circumstantial evidence in this action unless the facts relied on are

of such a nature and are so related to each [256] other that it is the only conclusion that can fairly be drawn or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory."

—10—

The Court erred in instructing the jury as follows:

"Now, as I told you before, the burden is upon the defendant here to prove its theory, that is that Walter Gamer deliberately destroyed himself. There is nothing but circumstantial evidence in this case to prove that theory. And if that evidence is not of a kind, character and of such a nature, and the facts detailed in proving the circumstances are not so related to each other that the suicide theory is the only reasonable conclusion that can be drawn in this case from the facts in evidence, you must find for the plaintiff here."

—11—

The Court erred in instructing the jury as follows:

"The law as stated by the Circuit Court of Appeals in this case, which is binding here, with reference to similar conditions, is that where there was no testimony with reference to the matter, that is with reference to what the effect of coming in contact with a body would be upon a bullet, but we

can take judicial notice of the fact. Now that is a matter that the court takes knowledge, or notice, of and instructs you that as a matter of law: 'We can take judicial notice of the fact that a rifle ball striking a smooth surface at a slight angle would ricochet,' that is fly off at an angle, 'and that this ricochet will not be in the same plane in which the bullet was moving at the time it struck the smooth surface, but will divert therefrom at an angle, due to the fact that the rifle bullet is not only moving forward but is rapidly revolving on its longitudinal axis.' So, gentlemen of the jury, the court becomes an expert on bullets and firearms, and the court tells you that in the light of common experience a bullet striking a [257] smooth or a hard surface will be deflected from its course and that, so far as I recall, there is not a particle of testimony in this case of experts as to what angle it will go in, how far it will diverge from the direct line; and that, as I recall the testimony, though that again is for you, the witness who did testify on that question said it was an uncertain and speculative matter that no man could determine. Now ask yourself whether the skull of a human being and particularly E. Walter Gamer would not be such a surface as to cause a bullet to deflect and go at an unknown angle. That is for you to decide."

—12—

The Court erred in instructing the jury as follows:

"In conclusion, the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00 with interest."

—13—

The Court erred in refusing to give to the jury defendant's requested instruction numbered 7, which proposed instruction is as follows:

"You are instructed to return your verdict in favor of the defendant on the cause of action sued upon by the plaintiff and based upon the accidental death benefit provision contained in the policy of insurance involved in this suit, and to return your verdict in favor of the plaintiff and against the defendant for the sum of $10,066.96 on account of the death benefit provided in said policy." [258]

—14—

The Court erred in refusing to give to the jury defendant's requested instruction numbered 9, which proposed instruction is as follows:

"You are instructed that the burden is upon the plaintiff to prove by a preponderance of the evi-

dence that the insured, Edward W. Gamer, met his death solely by accidental means, and if the plaintiff has failed in this respect plaintiff cannot recover under the double indemnity provisions of the contract of insurance."

—15—

The Court erred in refusing to give to the jury the defendant's requested instruction numbered 11, which proposed instruction is as follows:

"You are instructed that the burden of proof is on the plaintiff to show that the death of Edward W. Gamer was caused by external, violent and by accidental means, and if you find from all the evidence that the insured, Edward W. Gamer, intentionally inflicted upon himself the injury which caused his death, then you are instructed that the plaintiff cannot recover the accidental death benefit provided in the policy, and your verdict will be for the defendant and against the plaintiff for such accidental death benefits."

—16—

The Court erred in denying defendant's motion for a new trial.

WHEREFORE, defendant, New York Life Insurance Company, prays that the said judgment of the District Court of the United States, for the District of Montana, may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated this 31 day of January, 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant and Appellant
New York Life Insurance Company. [259]

Service of the within and foregoing Assignment of Errors is acknowledged and copy thereof received this 31 day of January, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [260]

Thereafter, on January 31, 1936, the Order of the Court allowing an appeal was duly filed in said cause in the words and figures following, to-wit: [261]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The petition of defendant New York Life Insurance Company for an appeal from the judgment entered in the above entitled Court and Cause on the 18th day of November, 1935, is hereby granted, and the appeal is hereby allowed, and the bond on appeal (cost and supersedeas) is hereby fixed in the sum of Twenty-five Thousand Dollars.

Dated this 31 day of January, 1936.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [262]

Thereafter, on January 31, 1936, the supersedeas and cost bond of defendant and appellant for costs and damages on appeal was duly filed herein, in the words and figures following, to-wit: [263]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That AMERICAN SURETY COMPANY OF NEW YORK, a corporation duly authorized to execute surety bonds in the State of Montana, is held and firmly bound unto STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased, the plaintiff in the above entitled action, in the sum of Twenty-five Thousand and no/100 Dollars, the payment of which well and truly to be made it binds itself, and its successors and assigns, firmly by these presents.

Signed, sealed and dated this 31 day of January, 1936.

WHEREAS, defendant above named, New York Life Insurance Company, has petitioned for, and been allowed by the District Court of the United States for the District of Montana, an appeal to

the United States Circuit Court of Appeals for the Ninth Circuit, to correct and reverse a judgment rendered and entered in the above entitled Court and cause on the 18th day of November, 1935:

NOW, THEREFORE, the condition of the above obligation is such that if the said defendant and appellant, New York Life Insurance Company, shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the [264] above obligation to be void,—else to remain in full force and virtue.

IN WITNESS WHEREOF, American Surety Company of New York has hereunto caused its corporate name to be signed and its seal affixed by its proper officer thereunto duly authorized, the day of year first above written.

AMERICAN SURETY COMPANY
OF NEW YORK
By JOHN E. CORRETTE
Resident Vice-President

[Seal] By C. P. CALLAHAN
Resident Assistant Secretary.

The within and foregoing Bond is hereby approved this 31 day of January, 1936.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [265]

Thereafter, on January 31, 1936, the citation on appeal was duly issued herein, which original citation, with admission of service thereon, is hereto annexed and is in words and figures following, to wit: [266]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America, to Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased, plaintiff and appellee, and to Messrs. William Meyer and C. J. Christian, attorneys for said Executrix,—GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an Order allowing an appeal filed in the District Court of the United States, for the District of Montana, to the United States Circuit Court of Appeals for the Ninth Circuit, in a suit wherein you, Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased, are plaintiff and appellee, and New York Life Insurance Company, a corporation, is defendant and appellant, to show cause, if any there be, why the judgment rendered on the 18th day of November, 1935, against said New York Life

Insurance Company, mentioned in said appeal, [267] should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Given under my hand in the District of Montana, this 31st day of January, 1936.

JAMES H. BALDWIN
Judge of the District Court of the United States for the District of Montana.

Service of the within and foregoing citation on appeal acknowledged and copy thereof received this 31 day of January, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased.

[Endorsed]: Filed January 31, 1936. [268]

Thereafter, on January 31, 1936, the Praecipe of the Defendant and Appellant for Transcript of Record, with admission of service thereon, was duly filed herein, in the words and figures following, to-wit: [270]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court

of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to incorporate and include in such transcript of record the following, and no other papers or exhibits, to-wit:

1: The complaint in cause numbered 847 entitled Stella Jane Gamer, Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased, plaintiff, vs. New York Life Insurance Company, a corporation, defendant, together with Exhibit "A" attached to said complaint, except that there shall be omitted from said Exhibit A, as immaterial to said appeal the schedule of "Monthly and Annual Payments for each $1,000 of Proceeds of Policy."

2: The demurrer of the defendant to said complaint.

3: The order of the above entitled Court overruling the demurrer of said defendant to the complaint of said plaintiff dated the 1st day of November, 1933, as entered in the Order Book of the above entitled Court.

4: The answer of the said defendant to the complaint of [271] said plaintiff.

5: The reply of said plaintiff to the answer of said defendant.

6: The verdict of jury returned in the above entitled action and filed with the clerk on November 14, 1935.

7: The judgment of the above entitled court rendered and entered on said verdict on the 18th day of November, 1935, in the above entitled action.

8: The assignment of errors filed on behalf of defendant, petitioner and appellant in said action.

9: The petition for allowance of appeal.

10: The order allowing an appeal in said action.

11: The supersedeas and cost bond on appeal in said action.

12: The citation on appeal with admission of service filed in said action.

13: The Bill of Exceptions duly allowed, settled and filed in the above entitled court and cause, containing all of the evidence and all of the proceedings had upon the trial of the above entitled action, all rulings of the court, all exceptions thereto, all instructions to the jury and exceptions thereto, defendant's petition for a new trial, the order of the court denying new trial,—all as shown and appearing in said Bill of Exceptions.

14: Notice of filing transcript on removal of said cause from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, to the District Court of the United States, District of Montana.

15: This praecipe with admission of service thereon.

Said Transcript to be prepared and duly certified by you, as required by law and the rules of the above entitled Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and that you further state in your certificate, [272] under seal, the cost of said transcript and by whom paid.

Dated this 31 day of January, 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant and Appellant
New York Life Insurance Company.

Service of the within and foregoing Praecipe for Transcript of Record acknowledged and copy thereof received this 31 day of January, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [273]

Thereafter, on February 1, 1936, plaintiff and appellee's praecipe to supplement the record, with admission of service thereon, was duly filed herein, in the words and figures following, to-wit: [274]

[Title of Court and Cause.]

PRAECIPE TO SUPPLEMENT RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are hereby requested to insert in the transcript of record on appeal in the above entitled action:

(1) Plaintiff's bill of exceptions on Order denying motion to strike from defendant's proposed

bill of exceptions, and denying proposed amendments to defendant's proposed bill of exceptions.

(2) The minutes of the above entitled Court in the above entitled cause of date November 14, 1935. Also this praecipe.

Dated Butte, Montana, February 1st, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff.

Service of the within and foregoing Praecipe by copy admitted, February 1, 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant.

[Endorsed]: Filed February 1, 1936. C. R. Garlow, Clerk. [275]

That on January 31, 1936, the Plaintiff's BILL OF EXCEPTIONS ON ORDER DENYING MOTION TO STRIKE FROM DEFENDANT'S PROPOSED BILL OF EXCEPTIONS AND DENYING PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS was duly allowed, settled, signed and filed herein, which said Bill of Exceptions is in the words and figures following, to-wit: [276]

[Title of Court and Cause.]

PLAINTIFF'S BILL OF EXCEPTIONS ON ORDER DENYING MOTION TO STRIKE FROM DEFENDANT'S PROPOSED BILL OF EXCEPTIONS AND DENYING PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, That in the above entitled action on the 13th day of January, 1936, defendant served upon counsel for plaintiff its proposed bill of exceptions of proceedings had upon trial and on motion for a new trial.

That thereafter, to wit: on the 20th day of January, 1936, plaintiff served upon counsel for defendant her motion to strike from defendant's proposed bill of exceptions and her proposed amendments to defendant's proposed bill of exceptions.

That thereafter, by an Order of the Court, duly given and made, the settlement of defendant's proposed bill of exceptions was duly set for hearing for Monday, January 27, 1936, at 10:00 o'clock A. M. That on said date plaintiff being represented by her counsel, Messrs. Carl J. Christian and William Meyer, and defendant being represented by its counsel, Messrs. Charles R. Leonard, J. A. Poore and W. D. Kyle, the Court proceeded to hear argument upon plaintiff's motion to strike and her proposed amendments and after argu- [277] ment by

said respective counsel continued the further hearing thereof to Thursday, January 30, 1936.

That on said 30th day of January, 1936, the Court denied the motion to strike from defendant's proposed bill of exceptions, which said motion to strike was in words and figures as follows, to wit:

Comes now the above named plaintiff, and moves the Court to strike from defendant's proposed bill of exceptions, a copy of which heretofore, to wit, on January 13, 1936, was served upon counsel for plaintiff, all that portion of said proposed bill of exceptions commencing with the word "immediately" on line 1, page 269, and ending with the word "recess" on line 13, page 274, and as grounds of motion states:

1.

That the matter sought to be stricken tends only to encumber the record herein, and serves no useful purpose in that it relates to exceptions upon the part of counsel for defendant to the charge of the Court, and the instructions given by the Court to the jury, which said exceptions were not taken in accordance with Rule 58, Rules of Practice of the United States District Court, for the District of Montana, because the same were taken after the jury retired to consider their verdict, and such exceptions were taken and such proceedings had not in the presence of the jury but during their absence from the courtroom, and after they had retired to deliberate upon their verdict.

2.

That to permit said proceedings to remain as a part of the bill of exceptions would violate the provisions of Subdivision 1, of Rule 10, of the Rules of the United States [278] Circuit Court of Appeals for the Ninth Circuit.

The plaintiff moves to strike from said proposed bill of exceptions all that part thereof commencing with the words "the court" on line 1, page 243, to the figure "11", on line 25, page 248, on the grounds and for the reasons:

1.

That said proceedings were not intended to be and are not properly a part of the bill of exceptions or of the record in this case, and tend but to encumber the record because such proceedings were had for the convenience of counsel and to advise counsel of some of the instructions the Court intended to give so that counsel might avail themselves of such information and use the same during counsels' argument to the jury.

2.

That said proceedings, so had and referred to in the proposed bill of exceptions, were not, and are not authorized by law or by the rules of this Court, and therefore are not properly a part of said bill of exceptions.

3.

That the matter sought to be stricken tends only to encumber the record herein, and serves no use-

ful purpose in that it does not relate to exceptions upon the part of counsel for defendant to the charge of the Court, said exceptions not having been taken after the jury was instructed by the Court, in accordance with Rule 58, Rules of Practice of the United States District Court, for the District of Montana.

4.

That to permit said proceedings to remain as a part of the bill of exceptions would violate the provisions of Subdivision 1, of Rule 10, of the rules of the United States [279] Circuit Court of Appeals for the Ninth Circuit.

And comes now the above named plaintiff, and moves the Court to strike from said proposed bill of exceptions all thereof commencing with the word "said" in line 27, page 248, and ending with the words "refused Baldwin Judge" in line 22, page 253, on the grounds and for the reasons:

1.

That said proceedings were not intended to be and are not properly a part of the bill of exceptions or of the record in this case, and tend but to encumber the record, because such proceedings were had for the convenience of counsel, and to advise counsel of some of the instructions the court intended to give so that counsel might avail themselves of such information and use the same during the counsels' argument to the jury.

2.

That said proceedings, so had and referred to in the proposed bill of exceptions, were not and are not authorized by law or by the rules of this court, and therefore are not properly a part of said bill of exceptions.

3.

That the matter sought to be stricken tends only to encumber the record herein, and serves no useful purpose in that it does not relate to exceptions upon the part of counsel for defendant to the charge of the Court, said exceptions not having been taken after the jury was instructed by the Court, in accordance with Rule 58, Rules of Practice of the United States District Court, for the District of Montana.

4.

That to permit said proceedings to remain as a part of the bill of exceptions would violate the provisions of Sub- [280] division 1, of Rule 10, of the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

This motion to strike will be based upon the records and files of the above entitled action, upon the reporter's transcript of the proceedings had in said cause, and upon oral testimony to be produced at the hearing of this motion.

Which said Motion to Strike was by the Court denied, to which ruling of the Court plaintiff was granted an exception.

That plaintiff proposed to amend defendant's said proposed bill of exceptions in the following particulars, to wit:

Amend said bill of exceptions by striking therefrom all of said proposed bill of exceptions commencing with the words "the court" in line 1, page 243, to and including the figure "11" on page 25, line 248.

Strike from said proposed bill of exceptions all thereof commencing with the words "said instructions" in line 27, page 248, to and including the words "refused Baldwin Judge" in line 22, page 253.

Amend said proposed bill of exceptions by striking therefrom all thereof commencing with the words "The defendant excepts to the charge of the Court" upon line 19 on page 269 to and including the words "in recess" in line 13, page 274.

Which said proposed amendments were by the Court denied, to which ruling of the Court plaintiff asked for and was granted an exception, and thereupon plaintiff was granted twenty (20) days within which to prepare, serve and file her proposed bill of exceptions to the orders of the court denying her said [281] motion to strike from the defendant's proposed bill of exceptions and denying her proposed amendments to said proposed bill of exceptions.

And now, within the time allowed by law, and as granted by the Court, plaintiff presents this, her proposed bill of exceptions to the order of the Court denying her motion to strike from defendant's proposed bill of exceptions, and denying her amendments to defendant's proposed bill of exceptions, and asks that the same be signed, settled and allowed as true and correct.

Dated this 30th day of January, A. D. 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff.

Service of the within and foregoing proposed bill of exceptions is admitted and copy received this 30th day of January, A. D. 1936.

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant.

STIPULATION.

It is hereby stipulated and agreed that the within and foregoing proposed bill of exceptions may be signed, settled and allowed on January 31, 1936, as being full, true and correct and containing all of the proceedings had upon plaintiff's motion to strike from defendant's proposed bill of exceptions and from the order disallowing plaintiff's proposed amendments to defendant's proposed bill of exceptions. [282]

Dated January 31, 1936.

WILLIAM MEYER
CARL J. CHRISTIAN
Attorneys for Plaintiff.
CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Defendant.

United States of America
State of Montana
County of Silver Bow—ss.

I, James H. Baldwin, Judge of the District Court of the United States, for the District of Montana, who presided at the trial of the above entitled action, and who heard and passed upon the plaintiff's motion to strike from defendant's proposed bill of exceptions, and who heard and passed upon plaintiff's proposed amendments to defendant's proposed bill of exceptions, DO HEREBY CERTIFY: That said bill of exceptions is full, true and correct and contains all of the proceedings had upon said motion to strike and proposed amendments, as well as the orders of the Court thereon, and all exceptions taken to the rulings of the court thereon, and that there is incorporated in said bill of exceptions all rulings and orders made by the court upon said motion to strike and proposed amendments, and all exceptions thereto, together with the stipulation of the parties that the same may be signed, settled and

allowed by the Court as of this date, and the same is hereby signed, settled and allowed as full, true and correct upon the date hereof.

Done and dated this 31 day of January, 1936.

JAMES H. BALDWIN, Judge.

[Endorsed]: Filed January 31, 1936. C. R. Garlow, Clerk. [283]

That on November 14, 1935, MINUTE ENTRY on trial of cause herein was duly made herein, and is in the words and figures as follows, to wit: [284]

[Title of Court and Cause.]

Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon the court announced that it will give plaintiff's requested instructions numbered 1, 4, 5 and 6, and 2 and 3 as amended by the court, and defendant's requested instructions numbered 8 and 10, and that it refuses to give defendant's requested instructions numbered 7, 9 and 11. Thereupon, on motion of counsel for plaintiff, court ordered that plaintiff's requested instruction numbered 6 be withdrawn. Thereupon defendant excepted to the court's giving the said instructions requested by plaintiff and to the refusal of the court to give defendant's requested instructions numbered 7, 9 and 11, and exception noted.

Thereupon, after the arguments of counsel and the instructions of the court, the jury retired to consider of its verdict.

Defendant thereupon renewed its exceptions heretofore made to the giving of plaintiff's requested instructions, and to the refusal of the court to give defendant's requested instructions numbered 7, 9 and 11, and excepted further to certain of the other instructions now given by the court, and exceptions duly noted.

Thereafter, at 8:10 P. M. the jury returned into court with its verdict, which verdict was received by the court, read and filed, and by the jury acknowledged to be its true verdict, being as follows, to wit:

"Title of court and cause.

No. 847. Verdict.

We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant for the sum of $20,000.00 with interest thereon from the 8th day of May, A. D. 1933, at the rate of 6% per annum.

TROY EVANS,
Foreman."

Thereupon court ordered that judgment be entered in accordance with said verdict.

Thereupon, by agreement of counsel expressed in open court, court ordered that execution on any judgment that may be entered herein be stayed for thirty days, without bond.

Entered in open Court at Butte, Montana, November 14, 1935.

C. R. GARLOW, Clerk. [285]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. GARLOW, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 285 pages, numbered consecutively from 1 to 285 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 847, Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer also known as Edward W. Gamer, Deceased, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant, which have by praecipe been designated to be incorporated into said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Forty-three and no/100 Dollars ($43.00), and have been paid by the appellant.

WITNESS my hand and the seal of said court at Butte, Montana, this 10th day of February, A. D. 1936.

C. R. GARLOW, Clerk.

[Seal] By HAROLD L. ALLEN, Deputy. [286]

[Endorsed]: No. 8124. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a corporation, Appellant, vs. Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed February 13, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8124

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, September 31, 1936 at Seattle, Washington.

Before: Wilbur, Garrecht and Denman, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. J. A. Poore, counsel for appellant, and by Mr. Wm. Meyer, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 28, 1937.

Before: Denman, Stephens and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, Ordered that the typewritten opinion this day rendered by this court

in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the District of Montana.

OPINION

Before: Wilbur, Garrecht and Denman, Circuit Judges:

Denman, Circuit Judge:

This is the second appeal in this case.

The facts proved are not in their essence different from those presented to us on the former appeal, Gamer v. New York Life Ins. Co., 76 Fed.(2d) 543.

The appellant states its first contention on this appeal as follows:

> "The only question of ultimate fact to be determined in this case is: Was the death of Edward Walter Gamer due to accident or suicide?
>
> "Plaintiff alleges that his death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and did not result from self-destruction, but from the accidental discharge of a rifle. The answer denies that death resulted directly or indirectly

from the accidental discharge of the rifle, and alleges he took his own life."

Appellant describes what it "alleges" concerning suicide as an "affirmative defense". The policy insured against death in the sum of $10,000, and provided for the payment of a double indemnity in the event of death by accident, but that

"Double Indemnity *shall not* be payable if the Insured's death resulted from self-destruction, whether sane or insane;". (Italics supplied).

Liability for $10,000 was admitted, and that amount was tendered. The appeal concerns the verdict for $20,000, that is for the second $10,000 of the double indemnity.

Evidence was introduced from which the jury could infer that the special defense of suicide had been established. The District Judge, following the language of the instructions approved in Travellers' Ins. Co. v. McConkey, infra, instructed the jury as follows:

"Ordinarily, gentlemen of the jury, *in the absence of a plea by the defendant of suicide or self-destruction,* the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out.

"The question remains as to whether the death was accidentally caused, or the means of death was accidental, or whether it was suicide. But *when the defendant took the position that it takes here,* it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. * * *". (Italics supplied).

And again:

"In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance or greater weight of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary."

The appellant insurance company assigns and asserts error in that portion of the instruction which states that the burden is on the defendant insurer to prove by a preponderance of the evidence that Walter Gamer killed himself voluntarily, asserting the law to be that the burden of proof of suicide is not upon the insurer where it has raised the issue of suicide, but is on the plaintiff to show death by another accidental cause.

The situation in this case is the same as that in the case of Travellers' Ins. Co. v. McConkey, 127

U.S. 661, 664, 666, 667, where the Supreme Court considered the question whether such an instruction was error, the policy clause in that case being identical to the one here. In that case the death of the insured by gun shot was under such circumstances as to allow inferences either of suicide or accident. In that case, as in this, there was a general denial that the death of the insured was occasioned by bodily injuries effected through external, violent and accidental means, and the insurer pleaded specially that the decedent's death was caused by suicide.

The instruction to the jury which the Supreme Court held not error was:

> "The defendant, in its answer, alleges that the death of the insured was caused by suicide.
>
> "The burden of proving this allegation *by a preponderance of evidence rests on the defendant.* The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary.
>
> "* * * The burden of proof is upon the plaintiff to establish, by a preponderance of credible testimony, that the deceased came to his death from injuries (or an injury) effected through external, violent, and accidental means within the intent and meaning of the contract and conditions expressed in the policy.
>
> "* * * it does clearly appear from the evidence that the insured came to his death from

injuries or an injury effected through violent and external means, and * * * the presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract. This presumed fact is not conclusive, and may be overcome by evidence, if such there is in the case that the injuries were voluntary or intentional." (Italics supplied).

Travellers' Ins. Co. v. McConkey, supra, 664, 665.

The Supreme Court considered the two methods of raising the issues in the answer which, in that case, were as in the present one,—that is, first, the issue presented by the general denial and, second, the special issue presented as to suicide. Concerning the first issue it states (page 666):

"There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means."

In holding that the instruction in respect to the second issue as to suicide, i.e., that "the burden of proving this allegation by a preponderance of evidence rests on the defendant" was not error, the court held (page 667):

"In respect to the issue as to suicide the court instructed the jury that self-destruction was not to be presumed. In Mallory v. Travellers' Ins.

Co., 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. 'But', the court properly said, 'the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, *the law was for the plaintiff*, unless *that presumption was overcome by competent evidence? This* question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts." (Italics supplied).

This court has consistently relied upon and held in accord with the McConkey case. In Prudential Ins. Co. v. Baciocco, 29 Fed.(2d) 966, 967:

"It is not controverted that death by drowning is a death by external and violent means within the terms of the policy, nor is it questioned that in cases of this character where such a death is shown there is a presumption against the theory of suicide. Metropolitan Life Ins. Co. v. Broyer (CCA-9), 20 F.(2d) 818. It is also conceded that by reason of this presumption ap-

pellant had the burden of proving the contrary, and that where, as here, evidence of self-destruction is circumstantial, the insurance company must fail 'unless the circumstances exclude with reasonable certainty any hypothesis of death by accident, or by the act of another.' Tabor v. Mutual Life Ins. Co. (CCA) 13 F.(2d) 765, 769."

In the Broyer case, referred to above, citing the McConkey case, we held:

"The presumption is that Broyer did not commit suicide, and we cannot say that the jury erred in concluding that that presumption was not rebutted. Travellers' Ins. Co. v. McConkey, 127 U.S. 667, 8 S. Ct. 1360, 32 L. Ed. 308; International Life Ins. Co. v. Carroll (CCA-6) 17 F.(2d) 42."

Metropolitan Life Ins. Co. v. Broyer, 20 Fed.(2d) 818, 820.

The Carroll case last relied upon above is from the Sixth Circuit and it holds:

"The presumptions of law arising from the fact of death are against self-destruction, for human experience shows that it is rare, even among the unhappy. Insurance Co. v. McConkey, 127 U.S. 661, 8 S. Ct. 1360, 32 L. Ed. 308. * * * But certainly the law places upon him who relies upon self-destruction the burden of showing it by a preponderance of the evidence."

International Life Ins. Co. v. Carroll, 17 Fed. (2d) 42, 43.

The same rule is followed in this Circuit in the earlier case of Connecticut Mut. Life Ins. Co. v. McWhirter (CCA-9) 73 Fed. 444, 449, 450.

The insurance company contends that three cases from this Circuit: United States Fidelity & Guaranty Co. v. Blum, (CCA-9) 270 Fed. 946; Connecticut Gen. Life Ins. Co. v. Maher, (CCA-9) 70 Fed. (2d) 441, and New Amsterdam Casualty Co. v. Breschini, (CCA-9) 64 Fed.(2d) 887, have overruled this established doctrine. In no one of these cases was there any instruction to the jury as to the burden of proof and in all the question decided was whether there was any evidence to go to the jury that the cause of death was otherwise than by suicide. All the court held in these cases was that if there was evidence from which the inference could be drawn that the death was otherwise than by suicide, the verdict must be sustained.

In the Blum case, supra, the court relies for a statement of the law as to the burden of proof on Travellers' Ins. Co. v. McConkey, supra. In the case of New Amsterdam Casualty Co. v. Breschini, supra, (890) this court held that the evidence established suicide and required an instructed verdict for the insurer. Hence it held that the instruction concerning the burden of proof should not be given, stating:

> "There were numerous instructions upon the question of burden of proof and upon the presumption of accident in the case of unexplained injury. They are not applicable to a fully ex-

plained injury and should not have been given. See United States F. & G. Co. v. Blum (CCA) 270 F. 946."

In Connecticut Gen. Life Ins. Co. v. Maher, supra, there is no decision as to the effect of the presumption against suicide on the burden of proof. However, we did hold that the defendant had to overcome the presumption against suicide. There is no intimation that the defendant had overcome the presumption by merely going forward with the evidence and causing a disappearance of the presumption. It had to overcome the presumption. Certainly here is nothing which purports to overrule the holding of the Supreme Court in the McConkey case and of this court in the Broyer and Baciocco cases, supra.

The Supreme Court, recently, has recognized in its opinions the difference between those presumptions which cast the burden of proof on the party against whom the presumption exists, and presumptions which "vanish" when the party against whom they exist goes forward with the evidence and produces sufficient to warrant an inference overcoming the presumption. In the latter class of presumptions the party in whose favor the presumption exists still has the burden of proving the fact which the presumption supports.

This distinction is summarized in Atlantic Coast Line v. Ford, 287 U.S. 502, 506. There the court compares the presumption casting the burden of proof on the party against whom it is raised in the

case of Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 643, with the presumption which vanishes when the party against whom it exists goes forward with evidence tending to overcome it, recognized in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43. The summary of the Henderson case is as follows:

> "'Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that *vanished* upon the introduction of opposing evidence. * * * That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail *unless such testimony is found by the jury to preponderate.*'" (Italics supplied).
>
> Atlantic Coast Line v. Ford, 287 U.S. 506.

The Supreme Court in the McConkey case, supra, has decided, in a case identical with that at bar, that the presumption against suicide belongs to the class of permanent presumptions of the Henderson case, and not the vanishing presumption of the Turnipseed case. It squarely holds that it casts the burden of proof upon the insurer. This court is not in a position to hold either that the McConkey case has been overruled or that the law is left in a condition in which we may treat the question as one before us de novo.

This distinction between "vanishing" or temporary presumptions and permanent presumptions which "prevail unless such [opposing] testimony is found to preponderate" places the Supreme Court as not in agreement with the strongly reasoned and historically fortified conclusions of Professor Wigmore and Professor Thayer. According to them there is, properly speaking, only one kind of presumption, the kind which "vanishes" upon the going forward with the evidence to a point raising a contrary inference by the party against whom the presumption is raised. Wigmore, Evidence, Vol. 5, §2491; Thayer, Preliminary Treatise on Evidence, 339, 346.

In addition to the cases before cited, two recent opinions of the Supreme Court recognize the existence of both kinds of presumptions. In Heiner v. Donan, 285 U.S. 312, 329, the Supreme Court states "a rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof". Whether or not there is a "shifting" of the burden, this is the type of presumption recognized as placing the burden of proof of suicide on the insurer in the McConkey case. The opinion describes it as "a substitute for proof".

In the case of Del Vecchio v. Bowers, 296 U.S. 280, 284, et seq., the court holds a statutorily created presumption against suicide to be of the vanishing character described by Professors Thayer and Wigmore and recognized in the Turnispeed case. In the Del Vecchio case a Congressional statute created a

liability in an employer upon the death of his employe engaged in a maritime occupation. The liability arises from death in the course of such employment. The statute further provides that:

"In any proceeding for the enforcement of a claim for compensation * * * it shall be presumed, *in the absence of substantial evidence to the contrary*—

"(a) That the claim comes within the provisions of this chapter.

"(b) That sufficient notice of such claim has been given.

"(c) That the injury was not occasioned solely by the intoxication of the injured employee.

"(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." (Italics supplied).

33 U.S.C.A. §920.

The peculiar language of the statute will be noted. It is that death otherwise than by suicide "shall be presumed, in the absence of substantial evidence to the contrary". The court holds that, where there is no "absence" but *presence* "of substantial evidence to the contrary", the presumption ceases to exist.

The court confines its ruling to the limiting provision of the statute and is not ruling on the legal effect of the unrestricted presumption against suicide, stating (p. 286): "The *act under consideration,* however, does not leave the matter to be determined

by the general principles of law, but announces its own rule * * *". (Italics supplied). Certainly this has no application to a policy which specially *excepts* liability for suicide in the clause reading:

> "Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane;".

The presumption against suicide in the McConkey case is not of the character of the one created by the peculiar words of the statute of the Del Vecchio case. It is not controlled by the limiting words of the statute. Congress is dealing solely with employers' liability and its provisions for that status cannot be construed as declaring a new rule of presumption in insurance cases. Under the McConkey case the presumption is one which continues to exist in the presence of evidence to the contrary of which there must be a "preponderance" produced by the insurer to overcome it.

The court in the Del Vecchio case, supra, does not mention the McConkey case and we are unable to believe that it intends to overrule that case sub silentio and likewise to overrule its decision in Atlantic Coast Line v. Ford, 287 U.S. 502, and Western & Atlantic R. Co. v. Henerson, 279 U.S. 639, by holding that all presumptions vanish once the parties against whom they exist merely go forward with evidence tending to support a contrary inference. In refusing to accept such a silent submersion of the prior decision in the McConkey case we are moved by the confusion into which the litigants and

the legal profession would be thrown if the Supreme Court is deemed to overrule while it avoids the mention, much less the consideration of, a case which long ago established and has maintained a rule of law upon which they relied.

Confusion enough now exists as evidenced by the opposing holdings of the Sixth, Eighth and Ninth Circuits as against those of the Fourth and Fifth Circuits.

The Sixth and Eighth Circuits hold, with this Circuit, that the McConkey case declares the law, New York Life Ins. Co. v. Ross (CCA-6) 30 Fed. (2d) 80, 83; New York Life Ins. Co. v. Anderson (CCA-8) 66 Fed.(2d) 705, 710.

The Fifth Circuit, without mentioning the McConkey decision, has held that the presumption against suicide does not cast the burden on the insurer. New York Life Ins. Co. v. Driver, 79 Fed. (2d) 713, 715. The Fourth Circuit deems the McConkey case not to be the law and frankly accepts the views of Thayer and Wigmore. Jefferson Standard Life Ins. Co. v. Clemmer (CCA-4) 79 Fed. (2d) 724, 731. It does not consider any of the decisions of the Supreme Court we have cited recognizing the existence of the type of presumption controlling in the McConkey case.

The District Judge exercised his perogative of commenting on the evidence, and appellant claims as error that certain of his comments are argumentative. We cannot consider this because no objection or exception was taken below.

It is also claimed of an instruction that the bullet passing through the head of the deceased "must have been deflected and was deflected as I instruct you as a matter of law if it came into contact with any solid body or smooth surface" is not a matter of law and is not true as a matter of physics.

In this the appellant is correct. What a bullet does when it comes in contact with any solid body or smooth surface is not a matter of law but a matter of fact. The fact is that a bullet coming square onto and into a solid body having a smooth surface may not be deflected at all. The ricochet effect referred to in our opinion on the first appeal is where the bullet strikes "a smooth surface at a slight angle". However, this was harmless error, because it was the contention of the appellant that the bullet was deflected and the only evidence in the case on this subject is that it was deflected.

Objection was made to an instruction that a witness had testified that it was uncertain and speculative as to how much a bullet would be deflected on passing through the man's skull, and that the judge's recollection of the testimony was that there was no testimony concerning the bullet "as to what angle it will go in, how far it will diverge from a direct line". This comment had reference to the movement of the bullet from the muzzle of the gun into and through the skull and the amount it would be deflected thereby. The testimony was in answer to a question concerning the amount of deflection, if any, of the bullet "from the time it passed

through the man's head within that range, by the time it struck the ceiling". The witness testified that from the time it passed through he believed "it would not be more than two or three inches at the outside". This does not contradict the judge's statement concerning the absence of evidence as to the deflection during the complete time from before it passed through the man's head, the passing, and thereafter.

Error is claimed in the manner in which the jury was instructed that the insurance company had the right to make an autopsy. However, the claim that the manner was unfair and sought to create a wrong impression on the minds of the jurors is not supported by any objection or exception made at that time.

Error is claimed in an instruction to the effect that there "were no financial difficulties" with reference to a motive for the suicide of the deceased. No objection or exception was taken to the instruction on this ground.

We find no error in the record warranting a reversal of the judgment.

Affirmed.

[Endorsed]: Opinion. Filed June 28, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8124.

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the District of Montana.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It Is Further Ordered and Adjudged by this Court that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered June 28, 1937. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

APPLICATION FOR STAY OF MANDATE.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the New York Life Insurance Company, appellant in the above entitled action, by and through its counsel of record, and respectfully represents unto the above entitled court that it intends to and will apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of the above entitled court in the above entitled cause, rendered and entered June 28, 1937; and hereby applies to the above entitled Court for an order staying the mandate of the above entitled court in the above entitled cause until after the Supreme Court of the United States passes upon such petition.

Respectfully submitted,

CHARLES R. LEONARD
W. D. KYLE
J. A. POORE
Attorneys for Appellant
New York Life Insurance
Company.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Charles R. Leonard, Esq. counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 31, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, July 12, 1937.

[Endorsed]: Filed Jul. 12, 1937. Paul P. O'Brien, Clerk.

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred forty-six (346) pages, numbered from and including 1 to and including 346, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of July A. D. 1937.

[Seal] PAUL P. O'BRIEN,
Clerk

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcripe of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

(3180)

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO.....

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO.....

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of
The United States:

Petitioner, New York Life Insurance Company, respectfully petitions your Honorable Court for a Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Ninth Circuit rendered and filed June

28, 1937, on petitioner's appeal to that Court from the judgment of the District Court of the United States for the District of Montana made and entered November 18, 1935, in favor of respondent, Stella Jane Gamer, as Executrix of the will of Edward Walter Gamer, deceased, and against your petitioner, affirming said judgment, and represents as follows:

Petitioner issued to Edward W. Gamer its policy of insurance to take effect December 29, 1926, by which it agreed to pay to the executors, administrators or assigns of the Insured, Ten Thousand Dollars upon receipt of due proof of the death of said insured within seven years from the date the policy took effect, or Twenty Thousand Dollars if such death within the term period resulted from accident as defined under the "double indemnity" provisions therein set forth as follows:

> "The double indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury and within the term period. Double indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane. * * *" (9-10-11 R.)

The Insured died at Butte, Montana, April 10, 1933, as the result of a gun-shot wound,—the evidence showing that the muzzle of the rifle was in his mouth at the time it was discharged,—and thereafter and on or about May 8, 1933, Respondent furnished and delivered to Petitioner due proof of the death of said Insured (6R; 27 R, Par. 4),

and on or about June 9, 1933, petitioner tendered to respondent its check for $10,066.96, being the face of the policy plus an unpaid dividend and accumulated interest, in full settlement of all claims under the policy, which offer was refused (195-196-197 R), and said sum of money was by Petitioner deposited in court for Respondent.

On September 6, 1933, respondent commenced this action in the District Court of Silver Bow County, Montana, to recover from petitioner $20,000.00, with interest and costs, and the action was duly removed to the District Court of the United States for the District of Montana.

As a basis for her right of recovery, respondent alleged in her complaint:

> "That said Edward W. Gamer, the insured named in said policy of insurance, died at Butte, Montana, on the tenth day of April, 1933, and that the death of said insured Edward W. Gamer resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and * * * that the death of said insured did not result from self-destruction * * * (but) resulted directly from the accidental discharge of a fire-arm, to-wit: a rifle, the bullet from said rifle so accidentally discharged striking him and causing his death." (6 R.)

By its answer to said complaint, petitioner

> "Denies that the death of said Edward W. Gamer resulted directly or indirectly from the accidental discharge of a fire-arm, to-wit, a rifle, or any other fire-arm, and denies that any bullet from said alleged rifle, accidentally discharged, struck him or caused his death * * * and defendant alleges that the death of said E. Walter Gamer, also known

as Edward W. Gamer, resulted from self-destruction by means of intentionally discharging into his own body a certain bullet from a certain loaded rifle held in the hand or hands of himself with intention to take his own life and on the 10th day of April, 1933, the said Edward W. Game did take his own life." (27 R, 30 R.)

The only issue of fact presented by the pleadings is whether or not the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through accidental means, and not from self-destruction, whether sane or insane.

The action was tried in the District Court of the United States for the District of Montana before the Honorable George M. Bourquin, Judge, who directed a verdict for the petitioner, and from the judgment entered thereon the respondent appealed to the Circuit Court of Appeals of the Ninth Circuit, which Court (the Honorable Circuit Judge Wilbur and the Honorable Circuit Judge Denman sitting) reversed the judgment and directed a new trial, but stated in its opinion that the evidence leads "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged." (76 F.-2nd-543-544.)

The case was again tried before the Honorable James H. Baldwin, Judge, and a jury, and at the close of all the evidence, petitioner moved the Court to direct the jury to return its verdict in favor of respondent and against petitioner for the sum of $10,066.96 (the amount tendered by petitioner to respondent and paid into court), and against respondent and in favor of petitioner upon the question of double indemnity, on the grounds and

for the reasons: (a) that respondent had failed to show that the death of E. Walter Gamer was caused by any accidental means; (b) that the evidence shows the death of E. Walter Gamer was caused by self-destruction, and (c) that the evidence will not sustain a verdict in favor of respondent and against petitioner under the double indemnity provision of the policy. The motion was denied and exception reserved and allowed (242 R.).

The jury returned its verdict in favor of respondent for $20,000.00, with interest from May 8, 1933, at 6% per annum, upon which verdict judgment was entered November 18, 1935. (35-36-37 R.)

The Court instructed the jury (253-274 R) that

(1) "In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight, of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary." (257 R, Assigned as Error 293 R.)

(2) "Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-destruction, the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of death was accidental, or whether it was suicide. But when the defendant took the position that it takes here, it assumed the burden of

proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they would avoid recovery here, to your satisfaction and by a preponderance of the evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had that gun in his hand, proof that it was fired while it was in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the defendant's contention. In addition to that, it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life." (258 R. Assigned as Error, 293 R.)

(3) "The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary." (259 R. Assigned as Error, 295 R.)

(4) "Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning, the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you, that the presumption is not according to the fact. The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by a weapon in the hands of the deceased, the presumption against suicide still prevails, be-

cause if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary, and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it,—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof." (263 R. Assigned as Error, 296 R.)

(5) "In conclusion, the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that E. Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that E. Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00 with interest." (268 R. Assigned as Error, 300 R.)

To the above instructions, the defendant excepted as follows; and such exceptions were noted by the Court. (247 R.)

"The defendant excepts to the charge of the court that the burden is upon the defendant to prove that Walter Gamer intentionally took his own life, and that his death was not the result of accident or accidental means.

"The contract of insurance specifically provides that the defendant company shall be liable for double indemnity only in the event the death should be caused from bodily injury effected solely through external, violent and accidental means. And the burden is upon the plaintiff to prove that death was

caused by accidental means within the meaning of said contract of insurance, and that this embraces the fact that Walter Gamer did not take his own life and did not commit suicide whether then sane or insane, or whether then being capable, as a matter of law, of forming a fixed intention by reasoning or not. That the question of suicide in this case is not, as a matter of law, a question of defense, but is a question of substantive right to be first established (negatived) by the plaintiff before any recovery may be obtained by the plaintiff, and that the burden at no time shifts from the plaintiff to the defendant, but is upon the plaintiff throughout the entire case to prove by a preponderance of the evidence that Walter Gamer's death occurred through accidental means, whether sane or insane. (269-270 R.)

"The defendant objects to the charge and instruction of the court that there is a presumption in this case that Walter Gamer did not take his own life or did not commit suicide, for that under the facts in this case undisputed, the evidence will, as a matter of law, sustain but one conclusion and that is that Walter Gamer's death was not the result of accident but was the result of self-destruction." (270 R.)

"The defendant objects to the charge of the court in advising the jury that the burden is upon the defendant to show that E. Walter Gamer deliberately and intentionally took his own life; and in this connection states that the charge as given would lead the jury to believe that he must have been in such a state of mind that he could form an intent and that this may negative the contractual right of suicide, whether sane or insane." (272 R.)

An appeal was taken from said judgment by petitioner to the United States Circuit Court of Appeals for the Ninth Circuit, and a transcript of all the evidence and

proceedings filed in said Court of Appeals, and said cause was entered and docketed in said Court of Appeals, entitled

New York Life Insurance Company, a corporation,
Appellant,

vs.

Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased,
Respondent,

and numbered 8124 on the Docket of said Court.

The Assignment of Errors filed in said cause and urged upon said appeal appears in the Transcript at pages 288 to 302, inclusive, and embraces the errors that

(a) The Court erred in overruling and denying the motion of the defendant New York Life Insurance Company for a directed verdict against plaintiff and in favor of defendant upon the question of double indemnity, for that the plaintiff failed to show that the death of E. Walter Gamer was caused by any accidental means; that the evidence shows that the death of E. Walter Gamer was caused by self-destruction, and the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy. (Motion, ruling and exception, 242 R. Assignment 288 R.)

(b) The Court erred in instructing the jury as hereinabove set forth. (Exceptions 269 to 272 R., Assignment 293-300 R.)

Thereafter and on September 21, 1936, said cause came on to be heard in said Circuit Court of Appeals

before the Honorable Circuit Judge Wilbur, the Honorable Circuit Judge Garrecht, and the Honorable Circuit Judge Denman, and on June 28, 1937, the opinion of said Circuit Court was rendered and filed (R. 328), erroneously holding and deciding:

That the instructions herein complained of state the law;

That the burden of proving the death of the Insured was caused by suicide is upon the defendant;

That although plaintiff alleged accidental death and negatived death by suicide in her complaint, and defendant denied accidental death and alleged suicide, the burden of proving suicide is upon defendant because of such allegation;

That the presumption of law is that the death of Insured was not voluntary, and the burden is upon the defendant to overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary;

That the presumption of law that the death of Insured was not voluntary has the weight and effect of evidence, and does not vanish in the light of evidence tending to show the truth, but is to be considered by the jury with all other evidence in the case in arriving at their verdict;

That the Supreme Court of the United States recognizes in the law what is known as a "permanent" presumption and also a "vanishing" presumption, and that the presumption against suicide belongs to the class of permanent presumptions to be treated as evidence throughout the entire case;

That although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain the judgment;

> That the District Court did not err in overruling defendant's motion for a directed verdict; that the evidence is sufficient to sustain the judgment, and that the judgment of the District Court should be and is affirmed.

Said opinion is reported in 90 F. (2d) P..... and is found in the Transcript at page 328.

Pursuant to said opinion, and in accordance therewith, judgment of said Circuit Court of Appeals, affirming said judgment of said District Court, was filed and entered June 28, 1937, and appears in the Transcript at page 344.

Your petitioner is advised that said judgment of said Circuit Court of Appeals is final, and is erroneous, and that this Honorable Court should require the case to be certified to it for review and determination under the Act of Congress permitting such causes to be certified for revision.

JURISDICTION:

The Statute under which the jurisdiction of this Court is invoked is,

Sec. 240, Judicial Code, Amended; 28 USCA, Sec. 347, and provides, in substance, that

> In any case in a circuit court of appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

The Circuit Court of Appeals of the Ninth Circuit concedes that its opinion is in conflict with decisions of other circuit courts of appeal, but contends it is in accord with the decision of the Supreme Court of the United States in the McConkey case (127 U. S. 661), which is denied by petitioner, and admits that confusion exists as evidence by the opposing holdings of other circuit courts of appeal? (341 R.)

Where there is a conflict of decision upon the same question of law by different Federal Circuit Courts of Appeal, this Court will grant certiorari in order to secure uniformity of decision.

Gay v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099;

Greer v. United States, 245 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 559;

Wright v. Vinton Branch of Mountain Trust Bank (Decided Mch. 29, 1937), 57 S. Ct. 556, 81 L. Ed. 487;

Wayne United Gas Co. v. Owens Illinois Glass Co. (Decided Feb. 1, 1937), 57 S. Ct. 382, 81 L. Ed. 300.

And especially is this true, where the decision below is alleged to conflict with principles established by decisions of this Court.

The Ansaldo San Giorgio v. Rheimstrom Bros. Co., 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016;

Rule 38, Sub. 5 (b) of this Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT:

1: The decision of said Court holding that the burden of proving that the death of the insured was caused by suicide is upon the defendant, conflicts with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

2: The decision of said Court that the presumption of law is that the death of the insured was not voluntary, and the burden is upon defendant to overcome this presumption and satisfy the jury by a preponderance of evidence that his death was voluntary, conflicts with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

3: The decision of said Court that the presumption of law that the death of insured was not voluntary has the weight and effect of evidence, and does not vanish in the light of evidence tending to show the fruth, but is to be considered by the jury with all other evidence in the case in arriving at their verdict, is in conflict with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

4: The decision of said Court that the Supreme Court of the United States recognizes in the law what is known as a "permanent" presumption and also a "vanishing" presumption, and that the presumption against suicide belongs to the class of permanent presumptions to be treated as evidence throughout the entire case, is contrary to the decisions of the Supreme Court of the United States.

5: The decision of said Court that although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain a judgment, conflicts with decisions of this Court, and other Circuit Courts of Appeal, as well as with former decisions of the Circuit Court of Appeals of the Ninth Circuit.

6: The decision of said Circuit Court of Appeals that the District Court did not err in overruling defendant's motion for a directed verdict, and that the evidence is sufficient to sustain the judgment,—conflicts with decisions of the Supreme Court of the United States, and with the decisions of other Circuit Courts of Appeal.

AUTHORITIES SUSTAINING ABOVE REASONS:

In the opinion of the Court herein complained of, it is stated:

> "This distinction between 'vanishing' or temporary presumptions and permanent presumptions which 'prevail unless such (opposing) testimony is found to preponderate' places the Supreme Court as not in agreement with the strongly reasoned and historically fortified conclusions of Professor Wigmore and Professor Thayer. According to them there is, properly speaking, only one kind of presumption, the kind which 'vanishes' upon the going forward with the evidence to a point raising a contrary inference by the party against whom the presumption is raised. Wigmore, Evidence, Vol. 5, Sec. 2491; Thayer, Preliminary Treatise on Evidence, 339, 346." (R. 338.)

"Confusion now exists as evidenced by the opposing holdings of the Sixth, Eighth and Ninth Circuits as against those of the Fourth and Fifth Circuits. (341 R.)

"The Sixth and Eighth Circuits hold, with this circuit, that the McConkey case declares the law. * * *" (341 R.)

"The Fifth Circuit, without mentioning the McConkey decision, has held that the presumption against suicide does not cast the burden on the insurer * * *" (341 R.)

"The Fourth Circuit deems the McConkey case not to be the law and frankly accepts the views of Thayer and Wigmore. * * *" (341 R.)

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES:

In the case at bar, the contract of insurance provides that "the double indemnity provided for * * * shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means. * * * Double indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane." (9-10-11 R.)

The complaint alleges that death was caused by accidental means and not by suicide. (6 R.) The answer denies this, and alleges death was due to suicide. (27 R; 30 R.)

The Circuit Court of Appeals holds that because the defendant alleged in its answer that death resulted from

self-destruction, the burden is upon defendant to prove suicide, notwithstanding the terms of the contract of insurance, and the allegations of plaintiff that death was accidental and did not result from suicide, and relies upon Travelers' Insurance Co. v. McConkey, 127 U. S. 661, to sustain its decision.

The McConkey case clearly holds:

> "There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means."

Of course, proving death by accidental means necessarily negatives death by intentional means, or suicide.

This Court in the McConkey case further held that there is a presumption against suicide; it is contrary to the general conduct of mankind.

This presumption against suicide simply required the defendant to go forward with its evidence, for in the absence of any evidence to the contrary the presumption would prevail.

But there is not one word in the McConkey case which states or assumes that the presumption against suicide has the force and effect of evidence, or is to be considered by the court or jury after evidence is received tending to show the truth.

The following cases decided by this Court since the McConkey case clearly sustain these contentions:

In the case of Mobile, etc. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (commonly called the Turnipseed case), this Court, in construing a statute of

Mississippi making proof of injury inflicted by the running of locomotives or cars prima facie evidence of the want of reasonable care on the part of the servants of the company in reference to such injury, stated as follows:

> "We are not impressed with the argument that the Supreme Court of Mississippi, in construing the act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. *The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end,* and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law." (Italics supplied.)

In Western & A. R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445, 73 L. Ed. 884, this Court had under consideration a statute of Georgia providing that a railroad company shall be liable for any damages done to persons or property by the running of the locomotives or cars, or for damage done to any person in the employ of the company, unless the company shall make it appear that their agents and servants have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

This Court said:

"A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. * * * The Mississippi statute (in the Turnipseed case) created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. * * * That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by Section 2780 (the Georgia statute under consideration) is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment."

The Circuit Court of Appeals of the Ninth Circuit in the case at bar states: (337 R.)

> "The Supreme Court in the McConkey case, supra, has decided, in a case identical with that at bar, that the presumption against suicide belongs to the class of permanent presumptions of the Henderson case, and not the vanishing presumption of the Turnipseed case. It squarely holds that it casts the burden of proof upon the insurer. This court is not in a position to hold either that the McConkey case has been overruled or that the law is left in a condition in which we may treat the question as one before us de novo." (337 R.)

It is respectfully submitted that the McConkey case is not subject to any such interpretation, and that the Turnipseed case recognizes the legal effect of an inference arising from a presumption which requires the opposing party to go forward with his evidence, and when some

evidence disputing the inference appears, the inference is at an end. The Henderson case approves the Turnipseed case, and holds the Georgia statute unconstitutional because it has the effect of creating "an inference that is given the effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate."

In Heiner, Collector, v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. p. 772, the Government contended that the statute under consideration created a conclusive presumption and became a rule of substantive law, but this Court stated:

> "The earlier revenue act created a prima facie presumption, which was made irrebutable by the later act of 1926. A rebutable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof (citing Turnipseed case); and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and can not be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger case (270 U. S. 230), as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization."

In Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 Sup. Ct. 249, 77 L. Ed. p. 457, a statute of South

Carolina was attacked upon the contention that the Supreme Court of that state by affirming the judgment, in effect construed the statute to mean that failure to give the prescribed signals is negligence per se and raised a presumption that such failure was the proximate cause of the collision and warranted recovery by plaintiff without further proof, *"and that such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence."* After stating the instructions of the State Court, this Court said: "The effect of the ruling of the trial court is that the South Carolina statute was comparable with that of Mississippi (Turnipseed case) and not that of Georgia (Henderson case). It must be supposed that the court, with this in mind, intended to charge the jury in accordance with the language which it had just quoted. True, the jury was not told in so many words that, where countervailing evidence has been put in, the presumption comes to an end, but we think this is the fair purport of the language. . . . Certainly, the charge contains no affirmative words *directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case."* (Italics supplied.) . . . . "A reading of its opinion leaves no doubt that the State Supreme Court construed the statute as creating a presumption limited by the rule of the Turnipseed Case, . . . and considered the charge of the trial court as in harmony with that view,—namely, that *the legal effect of the presumption was to cast upon the railroad company the duty of producing some evidence to the contrary, whereupon the inference was at an end,* and the question became one for

the jury upon all of the evidence." (Italics supplied.)

The latest expression of the Supreme Court of the United States upon this subject is found in the case of Del Vecchio v. Bowers, 296 U. S. 280; 56 Sup. Ct. 190; 80 L. Ed. 229.

The Court said:

> "The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasion by the willful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. *The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.*" (Italics supplied.)
>
> "When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties, the proponent or the opponent, has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions; either the decedent accidentally killed himself, or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, *unless and until facts are developed by evidence.* The natural love of life, the comparative infrequency of suicide as contrasted with accident, and the likelihood that testimony as to the cause of death would be more readily available to the employer than to the claimant justify a presumption, which the law indulges in such a case, that the death was accidental. The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that

the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this prima facies. The statement in the act that the evidence to overcome the effect of the presumption *must be substantial* adds nothing to the well-understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony *sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.* If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con." (Italics supplied.)

Decisions of Circuit Courts of Appeal:
(Fourth Circuit):

The case of Jefferson Standard Life Ins. Co. v. Clemmer, 79 Fed. (2d), 724, decided October 24, 1935, is a brief in itself upon these questions, and one of the ablest and most instructive cases to be found in the books.

The policy sued on was practically identical with the one involved in the case at bar.

The entire opinion is very instructive, but for the sake of brevity we quote the following portion only:

"These reflections lead us to adopt the sounder view that the presumption against suicide is *not evidence at all,* but is a rule of law which in a case of this kind requires the conclusion, in the event of an unexplained death by violent injury, that the death was not suicidal until credible evidence of self-

destruction is offered. When such evidence is offered, whether it be in the course of the plaintiff's proof or by the defendant, the presumption as a rule of law disappears from the case and the trier of facts passes upon the issues in the usual way. When unexplained death by violence is shown, a defendant who seeks to avoid liability on the ground of suicide has the burden of going forward with the evidence or the issue of suicide will go against him, but if he offers such evidence, the burden of persuading the jury that death resulted from accident independent of suicide and all other causes remains with the plaintiff, if it rested upon him at the beginning, as in a suit upon an accident insurance policy * * *".

"It is contended that it was settled by the Supreme Court in Travelers' Ins. Co. v. McConkey, 127 U. S. 661, that the burden of proof as to suicide in an accident insurance case is on the insurer. In some jurisdictions, this view has been reluctantly given effect: (New York Life Ins. Co. v. Ross, 30 Fed. 2d, 80). In other cases it has been ignored. (Citing many cases in Note 4, page 729). The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant. Moreover, it is generally agreed that in later cases, Agnew v. U. S. 165 U. S. 36; 17 Sup. Ct. 235, 41 L. Ed. 624, and Holt v. U. S., 218 U. S. 245, 253, 31 Sup. Ct. 2; 54 L. Ed. 1021, the Supreme Court corrected the impression it had given in Coffin v. U. S. 156 U. S. 432, 460; 15 S. Ct. 394, 39 L. Ed. 481, that, in our system of jurisprudence, a presumption of law should be treated as evidence, giving rise to proof to the extent of its efficacy.

"The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance

policy, and cases in which the insurer in a life policy raises the defense of suicide. *If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policy-holder to show that the condition precedent to liability has taken place.* Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 S. Ct. 332; 35 L. Ed. 1160; Parish v. Order of United Commercial Travelers, 232 F. 425; Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701; Wigmore on Evidence, Sec. 2510 (b), (c)." (Italics supplied.)

(Fifth Circuit):

"It (presumption against suicide) does not regulate nor change the burden of proof, but it is an evidentiary presumption which may aid a lack of evidence, but cannot prevail against the evidence."

Travelers Ins. Co. v. Wilkes, 76 F. (2d) 701, 705;

Fidelity & Casualty Co. v. Driver, 79 Fed. (2d) 713;

New York Life Ins. Co. v. Trimble, 69 F. (2d) 849.

(Tenth Circuit):

In Frankel v. New York Life Ins. Co., 51 F. (2d) 933, the court said:

"Appellant invokes the rule that there is a presumption a death is not due to suicide but to accident, and contends that this, together with the evidence, required a submission of the case to the jury. The presumption is one of law. It is indulged because self-destruction is 'contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' And a party is entitled to the benefit of the presumption, in the absence of evidence respecting the cause of death. Travelers' Insurance

Co. v. McConkey, 127 U. S. 661. But the plaintiff had the burden of proving the fact necessary to establish the liability of the insurance company, and the legal presumption that might aid her could be of value only under circumstances leaving the cause of death in doubt. . . . As was aptly said in Von Crome v. Travelers' Ins. Co. (C. C. A.) 11 Fed. (2d), 350, the legal presumption disappears where there is evidence of suicide. . . ."

(Eighth Circuit):

In Willcuts v. Stoltze, 73 Fed. (2d) 868, 872, the court quoted with approval the following from Wigmore on Evidence, Sec. 2491:

> "It must be kept in mind that the peculiar effect of a presumption of law (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule."

Also: Von Crome v. Travelers' Ins. Co., 11 Fed. (2d) 350; Flannery v. Willcuts, 25 F. (2d) 951.

(Sixth Circuit):

The effect of the presumption against suicide is merely that the plaintiff must recover in the absence of evidence to the contrary.

New York Life Ins. Co. v. Ross, 30 F. (2d) 80; Harrison v. New York Life Ins. Co., 78 Fed. (2d) 421.

(First Circuit):

> "The law presumes that he (the insured) did not kill himself, in the absence of evidence to the contrary. But this presumption disappears and is entitled to little or no weight if the evidence reasonably leads to a contrary conclusion."
>
> Despiau v. United States Casualty Co., 89 Fed. (2d) 43. (Decided Mch. 15, 1937.)

(Former Decisions of the Ninth Circuit):

As we read the following former decisions of the Circuit Court of Appeals of the Ninth Circuit, they are contrary to the holding of that Court in the case at bar.

In the United States Fidelity & Guaranty Co. v. Blum, 270 Fed. 946, the complaint alleged that on January 12, 1917, "the said Samuel Blum died in the City of Seattle, County of King, State of Washington. His death was effected through external, violent and accidental means." The answer denied this allegation, and for an affirmative defense alleged: "That the policy relied upon by the plaintiff expressly excludes from the risks assured death effected through suicide, sane, or insane, or any attempt thereat, and the death of said Blum was effected through suicide or an attempt thereat, and not otherwise."

The Court said:

> "We think it indisputable that, while the plaintiff made out a prima facie case by showing death by external and violent means that the defendant was required to overcome, yet in the end it was incumbent upon the plaintiff to establish by a preponderance of the evidence the fact as alleged by her that death was effected through external, violent and accidental means. This is a burden which the plaintiff could not escape.

"Suicide is the antithesis of death by accidental means, and, of course, if it appears that Blum took his own life, plaintiff cannot recover under the policy. But this does not shift the burden. The clause in the policy requiring that death shall result through accidental means independent of all other causes devolves the burden upon plaintiff that she substantiate this also before recovery can be had. Travelers' Ins. Co. v. McConkey, 127 U. S. 661. * * *

"There is a presumption that death was not suicidal. This is disputable, *but to overcome it, there must be proof of a tendency to establish the fact sufficient for the jury's consideration.*"

In the case of Ariasi v. Orient Ins. Co., 50 Fed (2d) 548, decided by Circuit Judges Rudkin, Wilbur and Sawtelle, the Court cites and specifically follows the decisions of this Court in Western & A. R. R. v. Henderson, 279 U. S. 639, and Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, and holds that these decisions are in accord with the general rule announced by Wigmore on Evidence (2d Ed. 1923), and quotes and approves the language of that author, and also of Jones' Commentaries on Evidence (2d Ed. 1926), and distinctly approves the rule that "A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presumption merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done, the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked," citing Colangelo v. Colangelo, 125 A. 285.

In New Amsterdam Casualty Co. v. Breschini, 64 Fed.

(2d) 887, before Circuit Judges Wilbur, Sawtelle, and Mack, the court said, p. 890:

> "The trial court correctly instructed the jury that if the insured committed suicide, or if his death were caused by intentionally jumping from the balcony of the hospital, or if he were caused to jump by reason of insanity caused by disease or illness, the verdict should be for the defendant, *but upon the subject of burden of proof the instruction was that suicide, self-destruction, intentionally inflicted injuries, illness, and disease were affirmative defenses set up by the defendant and the burden was upon the defendant to establish these defenses by a preponderance of the evidence. IN THIS THE COURT WAS IN ERROR.*" (Italics ours.)

Notwithstanding the above quoted language, the Circuit Court of Appeals of the Ninth Circuit in the case at bar says in its opinion:

> "The insurance company contends that three cases from this Circuit: United States Fidelity & Guaranty Co. v. Blum, (CCA-9) 270 Fed. 946; Connecticut Gen. Life Ins. Co. v. Maher (CCA-9) 70 Fed. (2d) 441, and New Amsterdam Casualty Co. v. Breschini (CCA-9) 64 Fed. (2d) 887, have overruled this established doctrine. In no one of these cases was there any instruction to the jury as to the burden of proof. . . . " (335 R.)

(Text Writers):

Thayer, Preliminary Treatise on Evidence, pages 314, 336, 337, 339;

Wigmore on Evidence, 2nd Ed. 1923, Vol. 5, Secs. 2487-2498, and Chap. 88;

Jones' Commentaries on Evidence (2nd Ed. 1926), Secs. 30, 256.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, commanding the Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court according to law; and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court,—and for such further relief as may seem proper.

And counsel for petitioner hereby certify that the foregoing petition is well founded, and is not interposed for delay.

Respectfully submitted,

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BRIEF.

STATEMENT OF THE CASE

In addition to the facts set forth in the foregoing petition (and not repeated here at length for the sake of brevity), the following is a concise statement of the pertinent facts in the case:

Petitioner insured the life of decedent for $10,000, and agreed to pay double that amount if death resulted solely through external, violent and accidental means, but not as a result of suicide, sane or insane. (9-10-11 R.)

Insured died as the result of a rifle shot wound. The bullet entered his mouth and blew out the back of the head. No other conclusion can be deduced from the admitted facts, but that the gun was in his mouth when fired, and the Circuit Court of Appeals of the Ninth Circuit stated in its first opinion that the evidence leads "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the decedent at the time the rifle was discharged." (76 F. 2d, 544.)

Petitioner tendered the face amount of the policy and demanded full release, which was refused and suit brought for the face amount of the policy plus the double indemnity.

Respondent alleged death was due to the accidental discharge of the rifle, and not by reason of suicide. (6 R.)

Petitioner denied these allegations, and alleged death was due to suicide. (27 R., 30 R.)

Upon the trial, respondent proved death as the result

of a gunshot wound, introduced evidence tending to negative a motive for suicide, and relied on the presumption against suicide to sustain her complaint.

Petitioner produced evidence showing the actual physical facts, which are without material dispute, and from these facts the conclusion is irresistibly drawn that the muzzle of the gun was in the mouth of decedent when discharged, and that no person other than he placed the gun there and discharged it.

At the close of all the evidence, petitioner moved the Court to direct the jury to return its verdict in favor of petitioner on the question of double indemnity, for the reasons: (a) That plaintiff failed to show death was caused by accidental means; (b) that the evidence shows death was caused by self-destruction, and (c) that the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy. This motion was by the court denied, and exception noted (242 R.)

The Court instructed the jury (253-268 R.), over defendant's objection (269-274 R.), in substance, as follows:

1: The burden of proving suicide is on the defendant.

2: The presumption of law is that the death was not voluntary; that this presumption has the weight and effect of evidence, and is binding on the jury and they must find according to the presumption until it is overcome by other evidence, and that the burden of overcoming such presumption rests on defendant.

Verdict was rendered in favor of plaintiff for the full amount, $20,000, and interest, and judgment was entered thereon Nov. 18, 1935. (35-37 R.)

Appeal was taken to the Circuit Court of Appeals of the Ninth Circuit, and error assigned on the ruling of the Court denying defendant's motion for a directed verdict, and upon the instructions of the Court. (288-302 R.)

On June 28, 1937, the opinion of said Circuit Court was rendered and filed (R. 328), sustaining the instructions of the trial court, and sustaining its order denying defendant's motion for a directed verdict, and holding that although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain the judgment. (329 R.)

Judgment was entered by said Court affirming the judgment of the District Court, and filed and entered June 28, 1937. (344 R.)

Jurisdiction of This Court

is invoked under the provisions of Sec. 240, Judicial Code, Amended; 28 USCA, Sec. 347, providing in substance that

> In any case in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought thereby unrestricted writ of error or appeal.

The opinion of the Circuit Court of Appeals sustaining the instructions and rulings of the District Court, are in conflict with principles established by decisions of this Court, and decisions of other circuit courts of appeal.

The opinion of the Circuit Court admits that it is in conflict with the decisions of the Fifth and Fourth Circuits (341 R.), and claims to be in accord with the decisions of the Sixth and Eighth Circuits, and that its decision is in accord with Travellers' Ins. Co. v. McConkey, 127 U. S. 661, which is controverted by Petitioner.

The following uncontroverted evidence shows that the rifle was in the mouth of decedent when it was discharged, and could not have been accidentally placed there:

Insured was 51 years of age at his death on April 10, 1933 (20 R.); about 5 feet, 10 inches tall, and weighed from 170 to 190 pounds (95 R.; 110 R.); had a wife whom he married in 1908, and a daughter 11 years of age at the time of her father's death (135 R). He owned 5/12th of Gamer's Confectionery Incorporated (70 R.), which business was destroyed by fire in October preceding his death in April (81 R.) He frequently fished and hunted, and was experienced in the handling of firearms, and was always careful with them. (91, 121 R.) He was right-handed (121 R.) On the morning of his death, he had an engagement to meet his friend, Malcolm Gillis, at the Gamer Shoe store (44 R.). He arose about 9 o'clock; came downstairs and ate breakfast with his wife and daughter, and said to his wife, "I think I'll go fishing." He was dressed in clothes which he would wear fishing (136 R.), or would ordinarily wear around the home if he was going to do chores (51

R.). After breakfast, his wife went down-stairs to wash, and heard her husband in conversation with their daughter, engaged in washing and drying the dishes (137 R.). Later, she heard him go upstairs. Some time after she was called to the phone by Mr. Gillis, who wanted to speak to Mr. Gamer concerning their engagement. She started to go to the garage to find him, and the daughter, Elsie, ran up stairs. She heard Elsie scream and came back to see what was the matter. She went up stairs and saw Mr. Gamer's body, and then called for help. (138 R.).

Dr. McHeffey responded to the call. He immediately went to the home and arrived there about 10 minutes to 12 o'clock. No other man preceded him. He went upstairs, and saw the body of Mr. Gamer lying on the floor on its back in the bedroom, with the feet extending into a clothes closet a distance of about 12 inches. The rifle (Plaintiff's Exhibit 1) was resting on the body, with the stock between the feet, and the left hand, at a point about the navel of the body, holding the barrel of the gun just below the muzzle (149-150 R.).

Mr. Con Murphy, the coroner, who later arrived on the scene, also testified that the muzzle of the gun was pointed across the body, and the muzzle held in his left hand, about six inches beneath the sight. (102 R.). He testified: "There is no doubt about him having it (the gun) clasped in his hand. I took his fingers off, and removed the gun from the clasp of his hand." (105 R.). The doctor testified he made an examination of the body at that time before the coroner arrived. He partially turned the body over so he could see the wound in the back of the head, to ascertain whether life was entirely extinct. In the back of the head he found a large

wound,—all bone and soft tissue in the back of the head had been blown out, about 3 to 4 inches in diameter, about the occipital area. He did not move the gun and did not otherwise disturb the body. He then went downstairs and talked with Mrs. Gamer, and when the coroner arrived he and other men went up and viewed the body. He saw a laceration on the left lip of the deceased; it was a clean laceration of the upper lip on the left side; a laceration or tear. He stated the term "tear" might be the better term. There was no part of the lip missing, and no other wound in the front part of the head or face of the deceased. There was a hole in the plastered ceiling of the clothes closet about midway between the north and south wall and about one foot in from the door. He saw blood or matter about the hole, which hole was about the size of a quarter. There was blood and tissue over the closet in the vicinity of the door. There was a cigar butt on the window sill of the closet. He picked up an upper set of false teeth, and a pair of glasses from the floor. The false teeth were not broken, but the glasses were broken through the nose piece. He handed the teeth and glasses to the coroner. He also noticed teeth protruding from the mouth of the body as it lay on the floor. (149-155 R.)

There was one empty shell in the gun; no loaded shell. (88 R.; 97 R.; 106 R.)

Walter Arnold, an architect, made measurements and a map of the clothes closet. (Defendant's Exhibit 3.) This clothes closet adjoins the bedroom on the east. The clothes closet has a width of 2 feet, 3½ inches north and south, and 5 feet, 10½ inches in length. The ceiling of the closet from the floor is 8 feet, 9⅜ inches. There

is a window in the closet opening to the daylight, and it is 2 feet, 3½ inches from the trim on the door entering the closet to the edge of this window, and is 1 foot, 11 inches from the east end of the closet to the trim of the window. There is a 10-inch shelf extending along the north side of the closet, and about the same height as a shelf in the east end of the closet, which is 2 feet, 6 inches from the ceiling. Underneath the shelf to the east is a pole, or hanger rod, extending north and south. There are nine clothes hooks about an even distance apart along the north side of the closet, about 6 feet, 2 inches from the floor. There are four clothes hooks on the south side of the closet, on the west side of the window, which is just as you enter the closet. (141-143 R.)

Clothing was hanging on the hangers in the back of the closet; that is, at the east end of the closet. On the north wall of the closet, there were some hooks, and a few clothes were hanging there. On the south wall of the closet, there was very little if any clothing. (122 R.) These clothes were hanging down loose. (47-48 R.) There was also a box of shoes on the shelf on the north side. There was also a shotgun case in the closet about 2 or 2½ feet in length standing up in the southeast corner. There was a cylinder fishing pole container in the same corner, and a robe on the floor. There was also some old clothes, consisting of a pair of pants, coarse socks and a pair of shoes, tossed in. (122-123 R.) On the shelf was a loaded Colt .22 automatic pistol. (122 R.)

The undertakers, who washed and prepared the body for burial, testified in detail as to the wound upon the body, as follows: On the upper left lip, about one-eighth of an inch in from the corner of the mouth, was

a tear about half an inch long, extending upward toward the nose. The lip was torn through, with the exception of being held together in the center with a muscle fiber. (145 R.) Upon being sewed, the edges of this tear came together perfectly. There was no part of the lop missing.

There was no other wound upon the outside face of the body of Walter Gamer. (146 R.)

This wound on the lip did not appear to have been made with a knife. The edges were a little ragged. Three or four stitches were put in it. There was no missing skin and the wound came together normally. There was no evidence of a bullet wound through any portion of this laceration. (62 R.)

There was no other laceration or abrasion on the face of the deceased. (64 R.)

There were no bullet wounds or holes in the chin; nor in either side of the face; nor in the ear or eye, or nostrils. There was no bullet wound in any portion of the head, save and except the wound in the back of the head. (66 R.)

That portion of the back of the head, about the point of the occipital area of the skull, was blown out, to a diameter of about 3½ inches. (60 R.; 147 R.)

Mr. Gamer had no natural upper teeth. The plate found in the clothes closet by Dr. HcHeffey, and by him given to the undertaker, was placed in the mouth upon preparing the body for burial and fitted perfectly.

There was no portion of the gum torn. These upper teeth were not broken in any way. (146 R.; 62 R.)

The undertaker (Hanley) testified that at the home he noticed "the lower plate of teeth turned over and protruded outward." (60 R.) He further testified: "There

was no lower plate of false teeth, but there was bridge work. His lower teeth were his normal teeth, his own teeth. He had, I would say, about six, and it was bridge work from there back on each side of the six in the lower jaw. These two sides of artificial teeth on each side of the natural teeth were braced onto the lower teeth on each side and then braced across behind his own teeth. That brace is a form of reinforcemnt of wire, or maybe silver. At the time I saw the body of Mr. Gamer, the edge of this lower plate that I have just described was sticking just even with his mouth, out, with the teeth turned over, outward." (57-58, 146 R.)

The undertaker (Mr. Jordan) also testified: "When I first saw the body, the condition of this bridge work was such that the bridge had turned upside down and a portion of it was protruding out of the mouth,—I noticed that at the home and also at the mortuary." (147 R.)

There was no laceration or wound in the upper gum. (147 R.)

The bridge work was replaced in the mouth and fitted perfectly. (147 R.) But the reinforcement of these lower teeth broke at the adge when it was pressed back. (64 R.)

Mr. Gamer had six lower anterior teeth; they were two lower cuspids, right and left, and four incisors, and in common parlance would be the six teeth in his lower jaw immediately over the chin. He had no other natural teeth. He had an upper false plate, in which were fourteen teeth. They were composed of cellose material, a composition material which is a very hard substance. The upper plate was held in his mouth by suction; they were not fastened to anything. He had a partial removal

appliance of teeth in his lower jaw. There were two cast plates, very rigid, made of gold or composition, fastened to the lower cuspids. (Dr. Roberts, 171-2 R.)

There were three fractures of the lower jaw. These fractures were located on the right side in the middle of the lower jaw; one about the middle of the right side of the face; one below the right-hand corner of the mouth, and the third about the center of the chin. (65 R.) There was no outside wound visible; they were not compound fractures. (148 R.)

There were no powder burns upon the face. (148 R., 66 R.)

The length of the entire gun is 43¼ inches, and from the trigger to the end of the barrel measures 30¼ inches. (143 R.)

SPECIFICATION OF ASSIGNED ERRORS, HERE URGED.

1: The Circuit Court of Appeals erred in sustaining the ruling of the District Court overruling and denying the motion of defendant, New York Life Insurance Company, for a directed verdict against plaintiff and in favor of defendant upon the question of double indemnity, for that the plaintiff failed to show that the death of E. Walter Gamer was caused by any accidental means; that the evidence shows that the death of E. Walter Gamer was caused by self-destruction; and the evidence will not sustain a verdict in favor of plaintiff and against defendant under the double indemnity provision of the policy. (Motion, Order Denying Same, and Exception, R. 242. Assigned Error 288 R.)

2: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight, of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary." (Instruction 257 R.; Exception 269-274 R.; Assigned Error 293 R.)

3: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-destruction, the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of death was accidental, or whether it was suicide. But when the defendant took the position that it takes here, it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they would avoid recovery here, to your satisfaction and by a preponderance of the

evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had the gun in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the defendant's contention. In addition to that it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life." (Instruction 258 R.; Exception 269-274 R.; Assigned Error 293-294 R.)

4: The Circuit Court of Appeals erred in sustaining the District Courts instruction to the jury as follows:

"The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary." (Instruction 259 R.; Exception 269-274 R.; Assigned Error 295 R.)

5: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning, the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you, that the presumption is not according to the fact.

The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by a weapon in the hands of the deceased, the presumption against suicide still prevails, because if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary, and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it,—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof." (Instruction 263 R.; exception 269-274 R.; Assigned Error 296-7 R.)

6: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"In conclusion, the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00, with interest." (Instruction 268 R.; Exception 269-274 R.; Assigned Error 301 R.)

ARGUMENT

Specification of Error No. 1.

The Physical Facts Show Suicide.

There were no powder burns upon the face. The gun will show powder burns at a distance of at least 10 inches. Clyde McNeil, a ballistic expert, testified that he made experiments with this gun, delivered to him by counsel for the plaintiff for such purpose prior to the first trial of this case, and in making these tests he fired 12 or 14 shots, using a piece of paper as a target. He fired the gun holding the muzzle 1 inch from the paper; then 2 inches from the paper, and so on, adding 1 inch to the distance until he had fired 12 to 14 shots. He had powder burns on the paper at a distance of 10 inches, and more. (205-6 R.)

Mr. Gamer was right-handed, and the gun was clasped in his *left* hand about six inches below the sight. This demonstrates that he held the gun with his left hand at the time it was discharged. And it also demonstrates that the butt of the gun was on the floor when he fired the shot, otherwise the recoil of the gun would have kicked or dislodged it from his grasp. Mr. McNeil, the firearms expert, testified (and all who have used a gun of that calibre know), that if the gun had been held in the hand without being braced against anything, the recoil of the gun would have jerked it out of his hand. (219 R.) The gun has a weight of approximately 7¼ pounds. (211 R.)

The feet of Mr. Gamer were about 12 inches, or up to his knees, in the closet. (46 R.; 95 R.; 102 R.; 111 R.; 149 R.) The bullet hole in the plastered ceiling was about one foot east of the door in the closet, and about midway between the north and south walls of the closet, which shows that the gun was fired at approximately a right angle to the floor of the closet. The ceiling of the closet from the floor thereof was 8 feet, 9⅜ inches. (242 R.) The back of the head "about two inches above the neck" for a diameter of about 3½ inches, was blown out. (147 R.) The velocity of the bullet at the muzzle was 2700 feet per second. (205 R.) The deflection of the bullet after passing out of Mr. Gamer's head would not be more than 2 or 3 inches at the most. (233 R.) The gun is 43¼ inches in length. (143 R.) If Mr. Gamer was leaning over the gun when the shot was fired, the force of its explosion would tend to throw his body backwards (211 R.; 233 R.); and the fact that the butt of the gun was on the floor, while being fired in this position, would lessen the effect of the recoil. (219 R.)

The deceased was always careful with a gun (91 R.; 121 R.) There is a safety catch immediately back of the trigger, which when pressed forward locks the mechanism so that the gun cannot be fired; it is "safe." (200 R.) The trigger pull is 3½ pounds. (202 R.) There is a guard extending entirely about the trigger, and the gun is hammerless. (See Plaintiff's Exhibit 1.) The clothes in the closet were hanging loosely on hangers. (47-48 R.; 122 R.) There was some wearing apparel on the floor, tossed in. (122-123 R.) There was only one shell in the gun; none left in the magazine. (88 R.;

97 R.; 106 R.) The deceased kept his shells for this rifle in a drawer in the bedroom. (98 R.)

Walter Gamer had 6 lower anterior teeth; being two lower cuspids, right and left, and four incisors, being the six teeth in his lower jaw immediately over the chin. He had no other natural teeth.

He had an upper false plate, in which there were 14 teeth, composed of cellose material, a composition material which is a very hard substance. The plate was held in his mouth by suction; it was not fastened to anything. (171 R.)

He had a partial removal appliance of teeth in his lower jaw, consisting of two cast plates, very rigid, made of gold or composition, fastened to the lower cuspids. (171-2 R.)

The upper false teeth and his glasses were found on the floor of the closet. (153-4 R.)

One of two possible theories must be true: Mr. Gamer either took his upper set of teeth out of his mouth, or they were blown out by the force of the explosion. If he took them out, he tossed them in the closet, and did so for the purpose of placing the gun in his mouth before firing the shot. If they were blown out, then he could not have accidentally inserted the gun in his mouth without injuring these teeth or his lips or gums.

The opinion of Dr. Roberts was that the explosion of the gun in his mouth would have broken the teeth (175 R.), altho the denture was made of a very tough substance. (173 R.)

When the body was found, the lower bridge work was turned upside down and a portion of it was protruding from his mouth. (147 R.; 60 R.) The edge of

the lower plate was sticking even with his mouth, out, with the teeth turned over, outward. (57-58 R.; 146 R.)

There was no wound on the face, except a tear about one-half inch in length, commencing in the upper left lip about one-eighth of an inch from the corner of his mouth, and extending upward toward the nose. (145 R.) It was practically a complete split, but not such that you could take it apart, because it was held by a muscle fibre; the upper portion of the lip was held together by a muscle fibre, but both the outside and inside tissue was split,—the center being held together with a muscle fibre. (63 R.; 145 R.) Upon being sewed the edges came together perfectly; no part of the lip was missing; the edges of the tear were a little ragged, but there was no missing skin, and no evidence of a bullet wound through any portion of this laceration. (62 R.) In the opinion of Dr. Shields, it could not be a bullet wound (181 R.), but was due to stretching of the lip; it was a tear. (187-188 R.) In the opinion of Dr. Kistler (an experienced physician, surgeon and rifle expert) it could not be a bullet wound (230 R.), and might be from the sight of the gun. (235 R.) Further, there was no injury to the gums, either upper or lower. (146 R.)

The lower jaw was broken in three places. The breaks were simple fractures on the right side,—one about the middle of the right side; one below the right-hand corner of the mouth, and one about the center of the chin. (65 R.) In the opinion of Dr. Shields, the explosion of the gun within the mouth would snap the lower jaw down with such force that it would break. (192-193 R.) This was also the opinion of Dr. Kistler (231 R.), and of Clyde McNeil, a ballistic expert. (209 R.) And it

was the opinion of Dr. Shields that if the muzzle of the gun was posterior to the teeth, the explosive force within the mouth would force the teeth out. (190 R.) This was also the opinion of Dr. Kistler (230 R.), and of Mr. McNeil. (208 R.)

The muzzle energy of the gun was 2430 foot pounds (205 R.). Such a force exerted instantaneously within the confines of a human mouth would blow the mouth open, which would have the effect of snapping down the lower jaw, it being hinged and loose and the upper one being a part of the skull, and would at the same time exert a terrific expanding or stretching force within the mouth, which might cause the lip to tear and give way, and the muscle tissue, which more easily gives, would be the last to break, thus tearing the flesh of the lip inside and outside and leaving the muscle tissue between. (187-188 R.)

The gun was therefore within the mouth of Walter Gamer when he fired the shot which ended his life. This appears to be conceded throughout the trial by all persons, except the trial judge. (298 R.)

And the Circuit Court of Appeals on the first appeal of this case (76 F. 2d, 544), states that the facts lead "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged." And the same Court on the last appeal states, "The facts proved are not in their essence different from those presented to us on the former appeal." (328 R.)

The conclusion is just as certain that the muzzle of the gun was posterior to the teeth, otherwise the lower

set of bridge work could not have been forced outward. (190 R.)

It is also certain that the butt of the gun was held against the floor by Mr. Gamer when he fired the shot, otherwise the recoil of the gun, with its light weight, would have dislodged the gun from his hand, and it was found clasped in his hand.

It would not only be improbable but impossible to get the gun in the mouth in this manner by accidental means.

The moist cigar stub was placed on the window sill of the clothes closet, near the middle of the closet on the right side as you enter the closet. The cigar was "moist" when Merle Davis felt it. (120 R.) Why did he take the cigar stub out of his mouth and place it on the window sill of the closet? Certainly not by accident, but by design.

Every fact and circumstance above outlined and shown by the record is consistent with the theory of suicide and inconsistent with accident.

There is not one particle of evidence in the record upon which death by accident can be predicated. There is nothing to show that the gun could have been discharged except by design under the circumstances.

None of the foregoing evidentiary facts are contradicted, and none of the testimony of the Doctors and Experts is attempted to be disputed upon the record.

The plaintiff rested her case entirely on the presumption against suicide, and evidence tending to show a lack of motive. It is our contention that the presumption disappeared in the light of the evidence produced, as will be more fully discussed later in this brief.

It Is Unnecessary to Show Motive.

"Motive is helpful but is not essential. This is so because in this life men who have no apparent motive for it do commit suicide. Perhaps always in the case of a sane person who commits suicide there is a motive; but in many cases the motive is not and could not be proven."

New York Life Ins. Co. v. Trimble (CCA-5th) 69 F. (2d) 849, 851;

Aetna Life Ins. Co. v. Tooley (CCA-5th) 16 F. (2d) 243, 244;

Burkett v. New York Life Ins. Co., (CCA 5th), 56 F. (2d) 105, 107-8.

But the record shows that Mr.. Gamer owned 5/12th of the capital stock of Gamer's Confectionery Incorporated (69-70 R.), with a paid-in capital of $50,000. (75 R.) During the year 1932, he had a gross income of $11,493.43, and a net income of $10,443.95. Of this amount $4,166.85 was salary from this company, and $7,500 dividends from this company, and $31.97 dividends from other sources. (73 R.) The business was destroyed by fire in October, 1932. (72 R.) During the year 1932, he paid in interest $882.69. (74 R.) His gross income from January 1, 1933, to April 10 (the date of his death), was $1,863.38, of which $300 was salary, and $1,563.38 dividends from Gamer's Confectionery.

On April 24, 1933, the assets of Gamer's Confectionery Incorporated were as follows:

Bank Balance,	$10,394.57
50 shares First Bank Stock,	500.00
Notes Receivable,	144.99
Accounts Receivable,	449.88
Salvage in Furniture Fixtures and Equipment,	5,900.00
Salvaged Groceries, about,	500.00
Total Assets (71-72 R.),	$17,889.44
Indebtedness, approximately,	1,100.00
Net Worth of Gamer's Confectionery, after fire,	$16,789.44 (R 72)
of which Walter Gamer owned 5/12th, or	$ 6,995.60

The destruction of the business in 1932 cost him dividends from the business of $7,500, a yearly salary of over $4,000, and reduced the capital assets of the concern to $16,789.44. (74 R.) His only asset as shown by the record was his interest in this partially destroyed business, amounting to $6,995.60. As against this, he had paid interest as shown by his income tax return for 1932 of $882.69, but the record fails to show the amount of the debt or the rate of interest paid. The witness did not know. However, counsel for defendant asked that it be capitalized on the basis of 6%, the legal rate of interest in Montana, which would show that he owed $14,711.50, upon which he was paying interest, and therefore the record discloses that he was at the time of his death worth $7,715.90 less than nothing. (67-78 R.)

The above is shown by the testimony of Roscoe Thomas, who was called as a witness by plaintiff for the stated purpose of "showing the financial condition of the deceased" (68 R.), and it is to be presumed that the plaintiff put forth the best evidence available for such purpose, and made her case as favorable as possible. Plaintiff did not in any way seek to modify or change the effect of this evidence.

This may have been such a mental worry as to cause or contribute to his rash act.

Surmise or Conjecture Will Not Sustain a Judgment.

> Before there can be any room for a reasonable hypothesis of death by accident, there must be some facts and circumstances that would so indicate.
>
> Penn. Ry. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;
>
> New York Life Ins. Co. v. Anderson (8th CCA) 66 F. (2d) 705, 709;
>
> Frankel v. New York Life Ins. Co. (10th CCA) 51 F. (2d) 933, 935;
>
> Aetna Life Ins. Co., v. Tooley (5th CCA) 16 F. (2d) 243, 245;
>
> New York Life Ins. Co. v. Alman (5th CCA) 22 F. (2d) 98, 101;
>
> Burkett v. New York Life Ins. Co., (5th CCA) 56 F. (2d) 105, 108;
>
> Stevens v. White City, 285 U. S. 195, 52 S. Ct. 347, 350, 76 L. Ed. 699.

In the case at bar there is no evidence to show death by accident. What was the accident? How did it happen? As to whether an accident happened or not, is entirely surmise and guess.

On the other hand, the physical facts in the case point unerringly to self destruction. They are all consistent with suicide, and inconsistent with any other theory.

The District Court Should Have Sustained the Motion for a Directed Verdict.

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720;

Delk v. St. Louis, etc., Co., 220 U. S. 580, 31 S. Ct. 617, 620, 621, 55 L. Ed. 590;

United States v. Spaulding, 293 U. S. 498, 55 S. Ct. 273, 79 L. Ed. 617.

Specifications of Error Nos. 2, 3, 4, 5 and 6.

These specifications all relate, either singly or collectively, to errors of the Court in sustaining instructions to the jury that (a) the burden of proving suicide is on the defendant; and (b) that the presumption of law is that death was not voluntary; that this presumption has the weight and effect of evidence, and is binding on the jury and they must find according to the presumption until it is overcome by other evidence, and that the

burden of overcoming such presumption is on defendant,—and will therefore be discussed together under these subdivisions.

(A) *The Circuit Court of Appeals Erred in Sustaining the Instructions to the Jury that the Burden of Proving Suicide is on Defendant.*

The District Court, by the Instructions here assigned as error, instructed the jury, and the Circuit Court of Appeals affirmed the instructions, that the burden of proving suicide is on the defendant, and apparently did so because the defendant denied accidental death and alleged self-destruction.

The only issue is as to the double indemnity. The policy provides for double indemnity "upon receipt of due proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means. . . . . Double indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane." (9-10-11 R.)

The complaint alleges that the death of the insured "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and . . . . that the death of said insured *did not result from self-destruction* (but) resulted directly from the accidental discharge of a firearm, to-wit: a rifle. . . .". (6 R.)

The answer denies that the death of insured resulted from the accidental discharge of a rifle, and alleges that the death of the insured resulted from self-destruction. (27 R., 30 R.)

It is to be borne in mind that this is not a suit for

death, but for *death by accident.* The defendant at all times offered to pay the *death* claim, and tendered the money in exchange for a full release, which was refused. (195-196 R.)

The burden is upon the plaintiff to prove her cause of action, "death by accident," which proof would negative death by intention.

In the case of United State Fidelity & Guaranty Co. v. Blum (9th CCA), 270 Fed. 946, the plaintiff alleged that "death was effected through external, violent, and accidental means." The answer denied this allegation, and alleged that "death of the insured was effected through suicide, and not otherwise." The court held that "suicide is the antithesis of death by accidental means" and the burden was upon the plaintiff to show death by accidental means before she would be entitled to recover.

In the case of Travelers' Ins. Co. v. Wilkes (CCA 5th), 76 F. (2d) 701, under a like contract, and where the defendant had denied accidental death and plead suicide, the Court said:

> "The court correctly told the jury that the burden was upon the plaintiff to show that death was directly and independently of all other causes the result of accidental means, and that the burden of establishing an accidental death was upon her and remained with her throughout the case. At the same time, more than once and against requested charges to the contrary and over exceptions taken, the jury were told that the defense of suicide was an affirmative defense and the burden of establishing it by a preponderance of the evidence was upon the defendant. The latter charge would be correct in a suit upon the usual life policy containing an *exception* of death by suicide, for then the plaintiff need prove only death;

the insurer having to plead and prove the exception. But this policy promises payment *not for death, but for death by accident.* Suicide, at least when sane, is not accidental death. A plaintiff under this policy has the burden of proving an *accidental death, thereby negativing suicide.* The denial that the death was accidental was a sufficient plea. *The additional plea that it was suicide, though more specific, really added no defensive merit. It was not the setting up of an exception from the policy, but a denial that the death was of the sort insured against. The burden of proof remained on the plaintiff.* New York Life Ins. Co. v. Anderson (CCA) 66 F. (2d) 705; New Amsterdam Casualty Co. v. Breschini (CCA) 64 F. (2d) 887; Mutual Life Insurance Co. v. Gregg (CCA) 32 F. (2d) 567; United States Fidelity & Guaranty Co. v. Blum (CCA) 270 Fed. 946." (Italics Supplied.)

The case of International Life Ins. Co. v. Carroll (CCA 6th) 17 F. (2d) 42, 43, quoted by the Circuit Court of Appeals in the case at bar as sustaining its holding that the burden of proving suicide is upon the defendant (334 R.), is not in point here because the policy sued on was payable on proof of death, except that death by suicide terminated the policy and fixed the liability thereunder at a sum equal to the first year's premium. In that case, the contract provided for payment upon proof of death, except suicide. Of course, the burden of pleading and proving this exception rested with the defendant.

One of the most learned and instructive cases upon all questions here presented to be found in the books is the recent case of Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 Fed. (2d) 724. Therein that Court concerning this question says at page 732:

"Of course if the plaintiff foregoes his claim for double indemnity, and limits the suit to a single

liability, the burden of persuasion is on the company; and, on the other hand, if the company admits single liability and the contest is over the double indemnity, the burden of persuasion is on the plaintiff."

Federal Life Ins. Co. v. Zebec (CCA 7th) 82 F. (2d) 961, 963.

In the case of New Amsterdam Casualty Co. v. Breschini (CCA 9th), 64 F. (2d) 887, 890, the Court, speaking through Circuit Judge Wilbur, says:

"The trial court correctly instructed the jury that if the insured committed suicide, or if his death were caused by intentionally jumping from the balcony of the hospital, or if he were caused to jump by reason of insanity caused by disease or illness, the verdict should be for the defendant, *but upon the subject of burden of proof the instruction was that suicide, self-destruction, intentionally inflicted injuries, illness, and disease were affirmative defenses set up by the defendant and the burden was upon the defendant to establish these defenses by a preponderance of the evidence. In this the court was in error.*" (Italics supplied.)

In the case of Fidelity & Casualty Co. of New York v. Driver, (CCA 5th), 79 F. (2d), 713, 714, the Court says:

"The serious error lies in putting the burden on the defendant to show that the death was not accidental, but suicidal, in a suit on an accident policy. The plaintiff under such a policy can recover only on proof of death by accident as set forth in the policy. *A contention by the insurer that there was suicide is not the assertion of an exception which he has the burden of pleading and proving, but is only another way of saying that the death was not accidental.*"

But the Circuit Court bases its opinion in the case at bar primarily upon the case of Travelers' Insurance Company v. McConkey, 127 U. S. 661, and holds that case is authority for its decision that the burden is on the plaintiff to prove death by accident, and on the defendant to prove death by suicide.

It seems clear that if the plaintiff must show death by accident, it must negative death by intentional means, such as suicide; and if the defendant must prove death by suicide, it must likewise negative death by accident.

We do not believe the decision in the McConkey case is open to any such interpretation or construction.

This Court in that case clearly says:

> "There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means." (Page 666.)

The Court then says:

> "If he committed suicide, then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction *was not to be presumed*, but 'the *presumption is against the latter*. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless the presumption was overcome by competent evidence? This question must be answered in the negative. . . . "

> "*Upon the whole case,* the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external, violent and accidental means; also, that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death."

To our minds, this case clearly means that the burden is on the plaintiff to prove his case and show accidental death, or fail. The cause of death being unexplained, a presumption arises in accordance with human experience that it was not caused by suicide, and this presumption temporarily aided the plaintiff on whom was the burden of persuasion. This required the defendant to go forward with its evidence, or the issue of suicide would go against it, but did not place the burden on defendant of proving suicide, or change the burden of proof resting on the plaintiff.

There is nothing in the McConkey case which holds that this presumption against suicide has the force or effect of evidence, or is to be considered by the court or jury after evidence is received tending to explain the cause of death.

As was said by this Court in the case of Mobile v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78,—"The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When this is done, the inference is at an end."

Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 S. Ct., 249, 77 L. Ed. 457.

However, the proper construction and interpretation to be placed upon the McConkey case has given rise to much contrariety of opinion.

See: Jefferson Standard Life Ins. Co. v. Clemmer, 79 Fed. (2d) 724, at page 731, column one.

(B) *The Circuit Court of Appeals Erred in Sustaining the Instructions to the Jury that the Presumption of Law is that the Death was not Voluntary; that this Presumption has the Weight and Effect of Evidence, and is Binding on the Jury and they Must Find According to the Presumption until it is Overcome by Evidence, and that the Burden of Overcoming such Presumption is on the Defendant.*

These questions are answered by this Court, contrary to the ruling of the Circuit Court of Appeals in the case at bar, in the following cases:

Mobile v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78;

Western & A. R. R. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884;

Heiner, Collector, v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772;

Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 S. Ct. 249, 77 L. Ed. 457;

Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229.

The Circuit Court of Appeals of the Ninth Circuit misconstrues these cases, and holds that this Court recognizes in these opinions two classes of presumptions, one the "vanishing" type, citing the Turnipseed case, and the other the "permanent" presumption, citing the Henderson case (336-337, 338 R.), and that the

principle to be applied in the case at bar is that of the permanent presumption, citing the McConkey Case. (337 R.)

In other words, altho, as the court states, "evidence was introduced from which the jury could infer that the special defense of suicide had been established," (329 R.), yet the presumption against suicide is a *permanent* presumption in this case, and, as the jury was instructed, has the "weight and effect of evidence and is binding upon you and you must find according to that presumption until it is overcome by evidence that satisfies you that the presumption is not according to the fact." (263 R.; Assigned Error 296 R.)

Under this principle of law, the case was submitted to the jury without any evidence to sustain accidental death, and supported only by a presumption, which the evidence shows is contrary to the truth.

In the Turnipseed case (219 U. S. 35), this Court said:

> "The only legal effect of this inference (presumption of liability created by statute), is to cast upon the railroad company the duty of producing some evidence to the contrary. When this is done, the inference is at an end."

In the Henderson case (279 U. S. 639), this Court said:

> "A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. . . . The Mississippi statute (Turnipseed case) created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of Georgia as

> construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by section 2780 (the statute of Georgia under consideration) is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment."

The above language is misconstrued by the Circuit Court of Appeals of the Ninth Circuit into a holding by this Court that it recognizes a permanent presumption as evidence (336-337-338 R.), when the fact is that this Court held the Georgia statute unconstitutional because it was unreasonable and arbitrary in that it "created and inference of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

Following this reasoning, the Court again, in the case of Heiner, Collector, v. Donnan (285 U. S. 312) said:

> "A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof. . . ; and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same."

Again, this Court, in Atlantic Coast Line R. Co. v. Ford (287 U. S. 249, 53 S. Ct. 249), said:

> "True, the jury was not told in so many words that, where countervailing evidence has been put in, the presumption comes to an end, but we think this is the fair purport of the language of the court to the effect that appellants may rebut the presumption by their evidence, and that then all the evidence must be considered in determining the question of proximate cause. *Certainly, the charge contains no affirmative words directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case.*"

And the last expression of this Court on the subject is to be found in the case of Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229, and is as follows:

> "The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasioned by the wilful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. *The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.*" (Italics supplied.) (P. 193.)
>
> "When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties, the proponent or the opponent, has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions; either the decedent accidentally killed himself or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, *unless and until facts*

are developed by evidence. The natural love of life . . . . (etc.) justify a presumption, which the law indulges in such a case, that the death was accidental. . . . The employer must rebut this prima facies. . . . Once the employer has carried his burden by offering testimony *sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. . .* " (P. 193.)

Decisions of Circuit Courts of Appeal.

The case of Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 Fed. (2d) 724, is a brief in itself upon these questions, and holds:

That the presumption against suicide is not evidence at all, but a rule of law requiring the conclusion, in the event of an unexplained death by violence, that it was not suicidal, until credible evidence of self-destruction is offered. The presumption then disappears from the case. It simply performs the office of requiring the person seeking to avoid liability on the ground of suicide to go forward with evidence or the issue of suicide will go against him, but if he offers such evidence, the burden of persuading the jury that death resulted from accident independent of suicide and all other causes remains with the plaintiff.

To the same effect are the following cases:

Travelers' Ins. Co. v. Wilkes (CCA 5th), 76 F. (2d) 701, 705;

Fidelity & Casualty Co. v. Driver, (CCA 5th), 79 F. (2d) 713;

New York Life Ins. Co. v. Trimble (CCA 5th), 69 F. (2d) 849;

Frankel v. New York Life Ins. Co. (CCA 10th), 51 F. (2d) 933;

Wilcuts v. Stoltze (CCA 8th), 73 F. (2d) 868, 872;

Von Crome v. Travelers' Ins. Co., (CCA 8th), 11 F. (2d) 350;

Flannery v. Willcuts (CCA 8th), 25 F. (2d) 951;

New York Life Ins. Co. v. Ross (CCA 6th) 30 F. (2d) 80;

Harrison v. New York Life Ins. Co. (CCA 6th) 78 F. (2d) 421;

Despiau v. United States Casualty Co. (CCA 1st) 89 F. (2d) 43.

And as we read the former decisions of the Circuit Court of Appeals of the Ninth Circuit, they likewise sustain the ruling for which we contend:

See Ariasi v. Orient Ins. Co., 50 F. (2d) 548, where that Court cites and specifically follows the decisions of this Court in the Henderson and Turnipseed cases, and holds that these decisions are in accord with the general rule announced by Wigmore on Evidence, and quotes and approves the language of that author, as also Jones' on Evidence, and distinctly approves the rule that:

> "A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presump-

tion merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done, the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked."

And it has also been held:

"In suits on accident policies insuring against the risk of death from external, violent, and accidental causes, mere proof of death will not suffice. Plaintiff must prove, too, that death was accidental. The true rule, I think, is that, where plaintiff's proof shows a violent death, and does not show it to have been self-inflicted, his case is prima facie made out, because suicide will not be presumed. When, however, plaintiff's case, as here, conclusively shows death by violence self-inflicted, plaintiff has not discharged her burden unless her proof goes further to show that the circumstances of the self-infliction are at least consistent with the theory of accident. Plaintiff fails here, not because the proof has overcome the presumption against her son's suicide, but because the proof fails to raise any presumption in her favor."

Boggan v. Provident Life & Acc. Co. (CCA 5th), 79 Fed. (2d), 721, 723;

New York Life Ins. Co. v. Trimble (CCA 5th), 69 Fed. (2d), 849, 851.

Text Writers:

Thayer, Preliminary Treatise on Evidence, pages 314, 336, 337, 339;

Wigmore on Evidence, 2nd Ed. 1923, Vol. 5, Secs. 2487—2498, and Chap. 88;

Jones' Commentaries on Evidence (2nd Ed. 1926) Secs. 30, 256.

Conclusion.

It is respectfully submitted that this Honorable Court should correct the rulings of the Circuit Court of Appeals herein complained of, to the end that the cause may be determined in accordance therewith.

Aetna Ins. Co. v. Kennedy (Decided May 17, 1937), 57 S. Ct. 809, 81 L. Ed. 754;

Baltimore & C. Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636;

Slocum v. New York Life Ins. Co., 228 U. S. 364, 387, 33 S. Ct. 523, 57 L. Ed. 879.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 323

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

I.

It is contended by counsel for respondent that the decision of the Circuit Court of Appeals of the Ninth Circuit (Gamer v. New York Life Insurance Company, 76 F. .....2d....., 543) reversing the judgment of Judge Bourquin granting defendants' motion for a directed verdict, and the decision of the same Court (New York Life Insurance Co. v. Gamer, 90 F. .....2d.....817) sustaining the judgment entered upon the second trial of the case, "preclude any further right upon the part of petitioner herein to have reviewed the decision of the trial court holding that under the facts presented the question of suicide or accidental death was for the jury, or to have reviewed the decisions of the Circuit Court of Appeals so holding." (Respondent's Brief, page 6.)

In other words, it is now contended by respondent that the two decisions of the Circuit Court of Appeals of the Ninth Circuit, whether right or wrong, become the law of the case.

This proposition is untenable, for the reason that a prior decision of a Federal Circuit Court of Appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case.

> Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152;
>
> Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 24 Sup. Ct. 572, 41 L. Ed. 1004;
>
> Diaz v. Patterson, 263 U. S. 399, 44 Sup. Ct., 151, 68 L. Ed. 356;
>
> Burnrite Coal Briquette Co. v. Riggs, 274 U. S. 208, 47 Sup. Ct. 578, 71 L. Ed. 1002.

And in Messinger v. Anderson, 225 U. S. 436, 56 L. Ed. 1152, 32 Sup. Ct. 739, this Court, speaking through Mr. Justice Holmes, said:

> "In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not to limit their power."

Further, the ruling on a prior appeal in a particular case will not be adhered to as the "law of the case" where the Court is convinced that it ought not to stand.

> United States v. Bollman (CCA 8th) 81 F. (2d) 1009.

In the case of Higgins v. California Prune, etc., Inc. (CCA 2nd), 3 F. (2d) 896, the Court said:

> "Whatever may be said of earlier decisions, it is now well settled that the 'law of the case' does not rigidly bind a court to its former decision, but is only addressed to its good sense."

Illinois Cent. Ry. Co. v. Crail (CCA 8th), 31 F. (2d) 111.

II.

Cases Relied Upon By Respondent.

Home Benefit Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 25 L. Ed. 1160.

This case is not in point and has no application here, for the reason that it was based upon a policy of life insurance, containing an exception of liability in case of suicide. In such a case, it is settled that the burden is upon the defendant to plead and prove the exception.

Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 F. (2d) 724;

Federal Life Ins. Co. v. Zebeck (CCA 7th) 82 F. (2d) 961, 963.

In the case at bar, the insurance over which this controversy arises was against accident, and the burden was of course on the plaintiff to prove an accidental death, which proof in itself would negative suicide.

New York Life Insurance Co. v. Ross, 30 F. (2d) 80:

In the Ross case, it is stated: "The plaintiff introduced evidence tending to prove purely accidental cause of the injury, and evidence was introduced on behalf of the defendant below, tending to prove motive for suicide." (Page 81.)

In the case at bar, there is no evidence of accident, and the only possible theory upon which the case was submitted to the jury was that, as the court told the jury, the presumption of law is that the insured did not commit suicide, and this presumption has the force and effect of evidence, and is binding on the jury and they must find according to such presumption, until it is overcome by evidence satisfying them that the presumption is not according to the fact. (263 R.) This declaration is contrary to the decisions of this Court. (Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229, and other cases cited in the Petition and Brief in Support Thereof.)

It is further stated in the Ross case:

> "The only questions here are whether the court erred in charging that the burden of proof shifted to the defendant and the presumption remained throughout in aid of the plaintiff's case or until overcome by a preponderance of evidence.
>
> "As regards established principles of general application, this charge is open to objection for want of accuracy. A presumption is not evidentiary in its nature, and the burden of proof, in its usual and primary meaning as the risk of nonpersuasion of the jury, never shifts, but remains with the affirmative throughout the case. A presumption is a rule of law, attaching to a given state of evidentiary facts certain procedural consequences as to the duty of the production of other evidence by the opponent.

The 'effect of a presumption of law (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent.' The 'fallacy' of the Supreme Court in considering a presumption as a matter of evidence, in the case of Coffin v. U. S., 156 U. S. 432, is now generally rejected, even by the Supreme Court. (Citing authorities.)

"The presumption is founded upon the then state of the proof. It is always procedural. Thus, where the circumstances in evidence clearly and irresistibly lead to the conclusion of suicide, no presumption that the death was accidental arises. The plaintiff's case can receive no support therefrom. (Citing cases.)

"But as the court here charged the jury, where the facts and circumstances leave in doubt the question whether the death was by accident or suicide, then a presumption that it was accidental, founded upon observations of human nature and life as a whole, does arise. The effect of this presumption is merely that the plaintiff must recover, in the absence of evidence to the contrary from the opponent.

"This presumption, as such, would not survive the introduction of evidence tending to prove suicide or even motive for suicide. Thereafter it would have no place in the reasoning as a presumption; but, as a legitimate inference from human life, the effect would continue."

Compare these declarations in the Ross case, if the Court please, with the instructions in the case at bar.

Supreme Lodge, Knights of Pythias, v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741.

In this case, the question as to whether or not Beck committed suicide was open to conjecture, and the Court held that it was a question for the jury. There was no

evidence in that case that Beck placed the gun in his mouth. The evidence there was such that he might have stumbled and fell against the gun.

Wells Fargo Co. v. Mutual Life Ins. Co., 66 F. (2d) 890.

Counsel in their brief say that in the above case "the Court in its decision cited with approval the decision of Travelers' Insurance v. McConkey, 127 U. S. 661, and affirmed a judgment for the plaintiff." (Page 14.)

Counsel are in error, for the McConkey case is not even referred to in the above case, and it involved only the distinction between accidental death and death by accidental means.

New York Life Ins. Co. v. Miller, 81 F. (2d) 263.

Counsel quote from this case on page 15 of their brief. But this case involved a policy of life insurance, which contained an exception in the event of self-destruction.

> "If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policyholder to show that the condition precedent to liability has taken place." (Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. .....2d .....724.)

III.

On page 18 of Respondent's brief, we find the following:

> "We now desire to urge upon the Court that petitioner is not entitled to urge error in the giving of the instructions for the reason that exceptions thereto were not taken within the presence of the jury as provided by the rules of this Court and those of the Circuit and District Courts."

There is no merit to this contention, for the following reasons:

At the inception of the trial, the following inquiry was made by the court:

> "THE COURT: Is there any dispute as to where the burden of proof in this case is?
> "MR. POORE: We have our view,—it is on the plaintiff throughout the trial.
> "MR. MEYER: We have our view,—it is on the defendant as soon as the plaintiff has proven the death of Mr. Gamer resulted from violent and external means. The law presumes it was accidental.
> "MR. POORE: We dispute that as a matter of law and would be glad to furnish your Honor authority to support our position.
> "THE COURT: Very well." (38 R.)

The Court requested counsel for plaintiff and defendant to submit to the Court proposed instructions, and in accordance with such request counsel for the plaintiff submitted their proposed instructions numbered 1, 2, 3, 4, 5 and 6 (249-251 R.), and the defendant tendered its proposed instructions numbered by the Court 7, 8, 9, 10 and 11. (251-253 R.)

At the close of the evidence, and after the motion for a directed verdict had been made and overruled, the Court said:

> "THE COURT: So that the attorneys in the case now on trial may know what the law as given by the Court may be on the main issues involved in this case, it is ordered" that certain specified instructions so proposed will be given, and certain instructions so proposed are by the Court amended and given as amended, and certain instructions so proposed are refused. (See Record 243 to 253.)

As soon as the Court had indicated the instructions which were to be given and those refused, the following occurred:

> "MR. POORE: What time do we make a record on the instructions?
>
> "THE COURT: If you wish to take any exceptions, now is the time to take them.
>
> "MR. POORE: We desire to take them, your Honor." (244-245 R.)

Counsel for defendant then dictated into the record defendant's exceptions to the instructions which the Court said it would give, and excepted to the refusal of the Court to give its proposed instructions. (245-248 R.)

The case was argued to the jury by counsel for the respective parties, and the Court then instructed the jury, as it had previously stated it would, and the charge so given will be found at pages 253-268 of the record.

Upon concluding its charge, the Court stated:

> "The jury will retire in charge of the bailiff." (268 R.)

"Immediately after the Court had directed the jury to retire in charge of the bailiff, and as the jury was leaving the box, J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exception to the charge of the Court. Mr. Poore answered: 'Yes, Your Honor,' and immediately and while the jury was retiring proceeded to and did commence to dictate into the record but did not conclude the following exceptions to the charge of the Court:

"MR. POORE: Comes now the defendant in this cause and reiterates and re-asserts the same objections to the instructions given which it heretofore asserted in the initial partial settlement of the instructions as shown by the record. And the defendant now, in addition, makes the following objections and takes the following exceptions to the instructions of the Court as given to the jury:" (269 R.)

Then follows in the record the exceptions so taken. (See record 269-274.)

The Court then inquired: "Has the plaintiff any exceptions to the charge?" And Mr. Meyer, one of counsel for plaintiff, replied: "No, Your Honor." (274 R.)

The record then shows: "That thereafter, the jury retired to consider of their verdict, and subsequently—at 8:10 p. m. on November 14, 1935,—returned into court with their verdict." (274 R.)

The record, therefore, clearly shows that the rule of Co rt was fully complied with by defendant in the taking of its exceptions. Defendant did all that it could do to preserve its record. The Court stated what instructions it would give and those it would refuse before arguments were made to the jury, and exceptions

were duly noted thereto. The jury was then instructed, in the manner in which the Court had indicated, and as soon as the Court had concluded its instructions counsel for defendant reiterated the same objections theretofore made to the instructions, and again in detail excepted thereto.

In the case of United States v. Gotlieb Breitling, 20 U. S. (How.) at page 252 decided by Chief Justice Taney, it was objected that an exception was not taken in time. The Court said:

> "It is always within the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this Court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. And the time within which it may be drawn out and presented to the court, must depend upon its rules and practice, and on its own judicial discretion."

And in Elijah Phelps v. Jacob Meyer, 15 How. 160; 14 L. Ed. 643, the Court said:

> "It has been repeatedly decided by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminister 2nd, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record and cannot be carried before the appellate court by writ of error. It need

not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for the purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury."

In the case of Hickory v. United States, 151 U. S. 303; 14 Sup. Ct. Rep. 334, 339; 38 L. Ed. 170 (decided 1894), Mr. Chief Justice Fuller speaking for the Court said:

"The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them; and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it. . . . The trial judge could not have been in doubt as to the particular part of the charge objected to, and, as his attention was called to the matter before the jury retired, could have modified or withdrawn it if he had thought it necessary to do so; and the portion is excepted to with sufficient precision, so far as this court is concerned."

In Merchants' Exch. Bank v. McGraw, 76 F. 930 (9th Circuit), decided Oct. 19, 1896, the Court said:

"The proper practice is to inform counsel that, if they desire to take any exceptions to the charge, it must be done before the jury retires. It will always be sufficient if the exceptions be taken and noted at the time with sufficient certainty."

In the case of Price v. Pankhurst, 53 Fed. at page 312 (8th Cir.), it is said:

> "It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge excepted to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. . . . It is, of course, the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging the jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards."

In the case of Owens v. United States, 130 Fed. 279 (9th Cir.), Judge Ross said:

> "The record shows that the instructions to the jury were in the form of a written charge, covering 18 pages of the printed transcript. We do not at all question the general rule that, in the absence of a statutory provision or a valid rule of the court to the contrary, exceptions must be taken and entered prior to the return of a verdict, in order to entitle them to consideration by an appellate court.
>
> "The record shows that the trial commenced on Aug. 13, 1902, and terminated Saturday, August 16, 1902. After the attorneys for the respective parties had closed their arguments to the jury, the court instructed the jury in writing; and, as the members of the jury were filing out of the court-house, the attorney for the defendant stepped forward to the judge of the court, and said to him that he wished to except to portions of the charge, but that it was

impossible for him to intelligently do so until he could take the instructions and examine them, and thereupon inquired of said judge whether he had any rule of court as to the manner of taking exceptions to instructions,—to which the judge responded that he had no rule on the subject, and for counsel to adopt such practice as he might be advised was proper. The next day (Aug. 17th) was Sunday, and defendant's attorneys prepared a motion in arrest of judgment, a motion for a new trial, and written exceptions to the charge of the jury, and on that day handed to the judge a copy of the exceptions, and to the clerk of the court originals of the exceptions to the charge and the motions in arrest and for a new trial, with instructions to the clerk to file the three papers on Monday, the 18th of August, which was done accordingly."

The record further shows that the trial court entertained the exceptions, and overruled them.

"The trial judge therefore remained satisfied with the charge, notwithstanding the exceptions, and, of course, would not have changed it, had they been actually filed at the time the charge was delivered.

"Relying, as he did, on the response of the court, and handing to the court, as he did the next day, his exceptions in writing, which the latter entertained and considered on the motions for a new trial, we do not think they ought to be disregarded on the ground that they were not filed in time to allow the trial judge to consider his charge and 'give new and different instructions.' In the somewhat similar case of Ah Lep v. Gong Choy, 13 Or. 211, 9 Pac. 483, the Supreme Court of Oregon applied the maxim that 'an act of the court shall prejudice no man.'"

In the case of Manuel Zeno Gandia v. Pettingill, 222 U. S. 452; 56 L. Ed. 267; 32 Sup. Ct. 127, decided

January 9, 1912, opinion by Mr. Justice Holmes, the Supreme Court of the United States said:

> "An exception was taken to the judge's sending the jury out before the counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct the jury otherwise than as he had, and he allowed all the exceptions to be taken in open court after the jury had retired.
>
> "No doubt it is the stricter practice to note the exceptions before the jury retires (the judge, of course, having power to prevent counsel from making it an opportunity for a lost word to them.) Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643. But in this case they were noted at the trial, in open court (United States v. Breitling, 20 How. 252, 15 L. Ed. 900) and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground."

And in the case of Dalton v. Moore, 141 Fed. 311, the Court, speaking through Judge Morrow, stated as follows:

> "It is further objected by the defendants in error that this court cannot consider the exceptions taken by the plaintiffs in error to the instructions given to the jury by the lower court, for the reason that the exceptions were not taken until after the jury had retired to consider their verdict; citing the cases of Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392; Yates v. United States, 90 Fed. 57, 32 C. C. A. 507, and Thiede v. Utah, 159 U. S. 522, 16 Sup. Ct. 62, 40 L. Ed. 237. . . .
>
> "The verdict of the jury was returned and entered of record November 28, 1903. The objections and exceptions were allowed on December 10, 1903, and filed December 18, 1903. A motion for a new trial was made immediately upon the entry of the verdict, and was denied on July 22, 1904. The instructions

to the jury were given near the close of the term, and it appears to have been the opinion of the court that the case should be concluded before the end of the term at midnight, in order that the regularity of the proceedings should be preserved. To accomplish this purpose, the court, before the case was closed, permitted counsel to take his exceptions afterwards that the jury might take the case without delay. The questions involved in the instructions were well understood by the court and counsel, and there was no misunderstanding as to the instructions that were given and refused, or the exceptions that counsel desired to take thereto. We think the plaintiffs in error cannot be deprived of their exceptions to the charge to the jury by the action of the court. Ah Lep v. Gong Choy, 13 Or. 211, 9 Pac. 483."

Petition for Certiorari denied by Supreme Court of the United States, Feb. 19, 1906, 200 U. S. 619, 50 L. Ed. 623, 26 Sup. Ct. Rep. 757.

As stated by the Supreme Court of the United States (Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. Rep. 334, 339, 38 L. Ed. 170), the purpose of the rule relating to exceptions to instructions is first that the matter excepted to shall be brought to the attention of the Court before the retirement of the jury so as to enable the Judge to correct error, if he deems there is any, in his instructions to them, and second that the appellate court may pass upon the precise question raised without being compelled to search the record to ascertain it.

Both of these conditions are met by the record here.

The Court called upon counsel for the respective parties to submit proposed instructions, and this was done, and the Court stated which instructions so proposed it would

give and which it would refuse. (243-253 R.). Prior thereto, and at the very inception of the trial, the Court had inquired if there was any dispute as to where the burden of proof rested, and was advised by counsel for the defendant that it was upon the plaintiff throughout the trial, which assertion was denied by counsel for the plaintiff. (38 R.) Authorities were submitted to the Court by counsel for respective parties.

While the Court was indicating which of the proposed instructions it would give and which it would refuse, the following inquiry was made by one of counsel for defendant:

> "MR. POORE: What time do we make a record on the instructions?"
>
> "THE COURT: If you wish to take any exceptions, now is the time to take them."
>
> "MR. POORE: We desire to take them, your Honor."

And counsel for the defendant then did dictate into the record the specific exceptions and objections it had to the instructions which the Court stated it would give, and its exception to the refusal of the Court to give certain requested instructions. (244-253 R.) This was all done before the case was argued to the jury. (253 R.)

After the case was argued to the jury, the Court stated: "The jury will retire in charge of the bailiff," and immediately thereafter J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exception to the charge of the Court. Mr. Poore answered: "Yes, Your Honor," and proceeded to immediately dictate into the record such exceptions while the jury was in the act of retiring, and

the first statement made by counsel was that he "reiterates and re-asserts the same objections to the instructions given which it (defendant) had heretofore asserted in the initial partial settlement of the instructions as shown by the record," and then stated the balance of his objections and exceptions. All of the exceptions were by the court overruled, and exceptions noted. (269-274 R.)

It is, therefore, apparent that the trial court had knowledge of the exceptions taken by defendant, and overruled them, and this even before the jury had retired. The record also clearly indicates the instructions given and refused, and the exceptions taken thereto, so that this Court will not be required to search the record therefor.

Further, it is universally held by this Court that on certiorari to review a decision of the Circuit Court of Appeals, matters not relied on as a basis for the petition will not be considered.

Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 38 Sup. Ct. 496, 62 L. Ed. 1096;

Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 53 Sup. Ct. 198, 77 L. Ed. 399;

Hubbard v. Tod, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246;

Gunning v. Cooley, 281 U. S. 90, 50 Sup. Ct. 231, 74 L. Ed. 720;

Helvering v. Taylor, 293 U. S. 507, 55 Sup. Ct. 287, 79 L. Ed. 623;

Charles Warner Co. v. Independent Pier Co., 278 U. S. 85, 49 Sup. Ct. 45, 73 L. Ed. 195;

Merchants Universal Joint Co. v. Culhane, 57 Sup. Ct. 81, 81 L. Ed. 25.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS P. KELLY,
CARL J. CHRISTIAN,
WILLIAM MEYER,
S. O. MEYER,
Butte, Montana,
Attorneys for Respondent.

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In the Supreme Court of the United States
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The above named respondent objects to the granting of a Writ of Certiorari herein upon the grounds and for the reasons:

1.

That the petition filed herein does not state facts sufficient to justify the issuance of a Writ of Certiorari.

2.

That the petition herein does not show a condition to exist demanding the issuance of a Writ of Certiorari,

which condition comes within the purview or terms of Supreme Court Rules, No. 38, Subdivision B.

3.

That the petition herein is insufficient to justify the issuance of the Writ of Certiorari in that while it shows confusion in the decisions of the different Circuit Courts of Appeal, it does not show that the decision of the Circuit Court of Appeals of the Ninth Circuit in the case at bar is in conflict with any decision of the Supreme Court of the United States.

4.

That from the petition herein it appears that the decision of the Circuit Court is in accordance and follows the rule of law announced by the Supreme Court of the United States in the case of

Travelers' Insurance Company vs. McConkey, 127 U. S. 661.

5.

A Writ of Certiorari should not be issued herein because the question here involved was and is the identical question raised in the case of

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80

which decision followed the rule announced in

Travelers' Insurance Company vs. McConkey, 127 U. S. 661

and a judgment for the plaintiff in said case upon the authority of Travelers' Insurance Company vs. McConkey was affirmed, and thereafter the appellant, New York Life Insurance Company, petitioned this Court for a Writ of Certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, which petition was by this Court denied.

See

New York Life Insurance Company, Petitioner vs. Sarah Ross, Exec., 279 U. S. 852.

ARGUMENT IN SUPPORT OF ABOVE OBJECTIONS

In support of the above objections we agree that the rules of this Court contemplate where there exists confusion in the decisions of the Circuit Courts of Appeal upon a question of law which should be definitely settled, this Court will accept jurisdiction by granting a Writ of Certiorari and having the matter presented to it for decision.

The question here involved has heretofore been definitely settled by this Court in

Travelers' Insurance Company vs. McConkey, 127 U. S. 661

and likewise in

Home Benefit Association vs. Sargent, 142 U. S. 691.

These cases, many years ago, established the law applicable in cases of this kind, definitely approved the instruc-

tions given by the trial judge in the case at bar, have never been reversed, modified or criticized by this Court, and have become the settled law pertaining to actions of this character.

With the foregoing thoughts in mind no reason exists for a further review of the law as therein announced. Furthermore, the same contention here made was advanced in

New York Life Insurance Company vs. Ross, 30 Fed. (2d) 80

and the Circuit Court of Appeals of the Sixth Circuit decided said contention was contrary to the Supreme Court decisions hereinafter announced, and upon the authority of such decisions approved instructions similar to instructions given herein by the trial judge, and this Court refused to review such decisions by certiorari.

New York Life Insurance Co. vs. Ross, Exec. 279 U. S. 852.

We do not feel justified in prolonging this brief by any further citation of authorities in support of our position.

ARGUMENT

Counsel for petitioner have in their brief set forth instructions of the trial court which they claim were erroneous. We shall not indulge in any repetition thereof, but shall call the Court's attention to the following portion of the instructions not quoted in the brief or petition of counsel for petitioner. In the course of his instructions the Court said:

> "Boiled down to its final essence, that is the question that you are called upon to decide, did Walter Gamer kill himself intentionally, and if Walter Gamer *did not kill himself intentionally this woman is entitled to $20,000.00; and if he did intentionally kill himself she is not entitled to any amount in excess of $10,000.00*" (R. 255.) (Italics supplied.)

We cite the foregoing not because it is of any particular consequence in a decision of the questions here involved, but more for the purpose of advising the Court that in his instructions to the jury the trial court made it very plain that there was but one issue for the jury to decide, namely: Did or did not Walter Gamer commit suicide.

While some mention is made, and counsel assign as error, that the Circuit Court of Appeals erred in holding that the District Court did not err in overruling defendant's motion for a directed verdict, we contend that this question is no longer a debatable one inasmuch as it has twice been decided contrary to the contention of counsel for petitioner, first in

> Gamer vs. New York Life Insurance Company, et al, 76 Fed. (2d) 543,

and again in the decision which it is now sought to review,

New York Life Insurance Co. vs. Gamer, 90 Fed. (2d) .....

which opinion is a part of the record on appeal herein. (R. 328.)

In addition to the two foregoing decisions, the petition of the New York Life Insurance Company for a new trial was denied in the District Court (not officially reported.)

To avoid any possible confusion in the minds of the Court, this case, upon the first appeal, likewise involved a claim for double indemnity against the Prudential Insurance Company. Prior to the trial of this action a settlement was reached with said company, which explains the difference in the title as well as parties litigant upon the two appeals.

Under the law as we view it, these decisions preclude any further right upon the part of petitioner herein to have reviewed the decision of the trial court holding that under the facts presented the question of suicide or accidental death was for the jury, or to have reviewed the decisions of the Circuit Court of Appeals so holding.

> "The right to limit liability turns upon whether such negligence was with the owner's privity or knowledge. Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge, and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it."
>
> Kellog & Sons vs. Hicks, 285 U. S. 502, 509.

In addition, we invite the Court's attention to the decision in

Pythian Knights Council vs. Beck, 181 U. S. 49,

wherein this Court, upon facts much more indicative of suicide than those in the case at bar, held the question properly one for the jury.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

Under the above heading counsel for petitioner make a brief reference to the decision of

Travelers' Insurance Co. vs. McConkey, 127 U. S. 661,

and then only for the purpose of contending that the law as therein announced has been reversed in later decisions by this Court. Counsel, however, failed to make mention or to call to the attention of this Court the fact that *the instructions in the case at bar, of which complaint is now made, were taken almost verbatim from those expressly approved in the McConkey case.*

A comparison of the record herein, particularly the instructions given, with that in the McConkey case, will show that said questioned instructions were expressly approved in the McConkey case, and while the McConkey case is not cited in the decision, the same rule of law was afterwards by this Court declared and approved in

Home Benefit Association vs. Sargent, 142 U. S. 691.

Neither of these cases or the rule of law therein announced has ever been disapproved, criticized or questioned by any declaration of this Court.

Counsel have cited certain decisions of this Court wherein they claim that this Court has deviated from the rule announced in the McConkey case. In view of the very excellent review of these decisions by Mr. Justice Denman in his opinion in this case (R. 328), we feel it would be futile upon our part to attempt any further effort to distinguish the decisions in the cases cited by counsel for petitioner from the decisions in the McConkey and Sargent cases. Suffice it to say, had this Court in mind, at the time such decisions were rendered, a modification or disaffirmance of the rules announced in the McConkey and Home Benefit cases, some declaration of such intention would have found itself into said decisions.

No mention of the McConkey or Home Benefit cases having been made in any of such decisions, the following rules apply:

> "A case is not overruled by an omission to mention it."
>
> U. S. vs. Moreland, 258 U. S. 433, 436.

> "The general language of a judicial opinion must be taken in connection with the point actually decided."
>
> Sterling vs. Constantin, 287 U. S. 378.

> "Always the language used in an opinion must be *read in the light of the issues presented.*" (Italics supplied.)
>
> Sinclair vs. U. S. 279, U. S. 749, 767.

As has been so well stated by Mr. Justice Denman, it is inconceivable that such was the intention.

May we quote from Judge Denman's decision:

> *"In refusing to accept such a silent submersion of the prior decision in the McConkey case, we are moved by the confusion into which the litigants and the legal profession would be thrown if the Supreme Court is deemed to overrule while it avoids the mention, much less the consideration of, a case which long ago established and has maintained a rule of law upon which they relied."* (R. 340-1.) (Italics supplied.)

To supplement said statement may we ask, what would be the result if trial courts were put in error because of the giving of instructions theretofore definitely and expressly approved by this Court?

To now reverse the rule announced in the McConkey case would create a condition in the trial courts and counsel whereby their uncertainty as to the rule to be followed in instructing juries would leave them so bewildered as to question their ability to decide upon the law to be followed.

In the Brief of counsel for petitioner is cited

Heiner vs. Donnan, 285 U. S. 312,

but therein this Court said:

> *"A reputable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof."* (Italics supplied.)

We fail to see what comfort petitioner can derive from this decision.

We shall not attempt a review of the decisions from the various Circuit Courts of Appeal cited by counsel for petitioner.

We do, however, desire to make a brief comment on the case of

Jefferson Standard Life Insurance Co. vs. Clemmer, 79 Fed. (2d) 724,

because of the insistence of counsel for petitioner that it is "one of the ablest and most instructive cases to be found in the books."

That decision recognizes that it is in conflict with the rule announced in the McConkey case, but attempts to justify its departure by the following:

> "The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant."

True, some Circuit Courts of Appeal have refused to follow the rule in the McConkey case, but in such refusal such Courts have either ignored the McConkey decision or attempted to distinguish it. In the case at bar both the District Court and Circuit Court of Appeals chose to follow the McConkey decision, resulting in the present attempt to have this Court declare such action erroneous.

The fallacy of the reasoning in the Clemmer case may perhaps be best illustrated by a review of two decisions cited therein and stated to announce a rule of law at variance with the rule in the McConkey case. We refer to the cases of

Holt vs. U. S., 218 U. S. 245, 253,

and

Agnew vs. U. S., 165 U. S. 36.

A reading of these cases will disclose that neither is an authority for the position of the learned judge who wrote the decision in the Clemmer case.

In the Holt case the defendant requested an instruction that the law presumed the defendant innocent, and added:

> "This presumption of innocence is evidence in the defendant's favor."

Mr. Justice Holmes held that the trial judge had correctly informed the jury regarding the presumption of innocence which surrounded the defendant, and in the course of his opinion stated that the concluding sentence of the tendered instruction would have a tendency to mislead the jury.

In the Agnew case an instruction was tendered by the defendant regarding a presumption, the concluding sentence of which was:

> "This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy."

and Mr. Chief Justice Fuller said that the tendered instruction had been covered by instructions given and might well have been refused because of the tendency of its closing sentence to mislead. Thus it will be seen that neither of these cases are authority for the position assumed by the learned judge that said decisions at least impliedly justified the conclusion that this Court was departing from the rule announced in the McConkey Case.

Furthermore, in

Heiner vs. Donnan, 285 U. S. 312

already referred to, this Court announced that a reputable presumption is a rule of evidence which has the effect of shifting the burden of proof, thus again placing this Court in disagreement with the decision in the Clemmer case.

It is true that in some of the decisions cited by counsel for petitioner some Circuit Courts of Appeal have not followed the decision in the McConkey case. We believe that the language of the Court in

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80

speaks far more eloquently than would or could any language of ours in refutation of the right of District or Circuit Courts to refuse to follow the rule announced in the McConkey case. Therein it is said:

> "The charge to the jury in the court below was manifestly carefully prepared with these authorities in mind. *So far as we are advised, the McConkey case has never been qualified nor overruled in this circuit. The former is binding upon this court, and both were binding upon the District Court.* (Italics supplied.) The doctrine announced in both thus becomes the law of all cases presenting the identical question. The situation is a most appropriate one for application of the doctrine of stare decisis. If this doctrine means, as was said in The Madrid (C. C.) 40 F. 677, 679, *"That when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases," precedents which cannot be distinguished should be followed until modified or overruled, and the interests*

of uniformity, certainty, and stability in the law thus promoted. (Italics supplied.) Certainty of a rule is often of equal importance with theoretical accuracy.

"We are unable to satisfactorily distinguish the case of Travelers' Ins. Co. vs. McConkey in the Supreme Court, or more especially Standard Life, etc. Co. vs. Thornton, in this Circuit, from the present action, and although, except for these cases, the charge would not seem to us properly to apply the abstract principle of law, we cannot say that the Court erred in following the doctrine announced in these decisions.

The judgment must therefore be affirmed."

In a concurring opinion by Circuit Judge Denison, he said:

"In this case, as in the McConkey case, it seems to me that, in spite of the protestations to the contrary, the burden of proof—the rise of nonpersuasion—was shifted to defendant. As I read the charge of the trial court in the McConkey Case, it was that the burden of proof to show accident, rather than suicide, was on the plaintiff, but that if the evidence of each was equally balanced, 'the law was for the plaintiff.' The Supreme Court approved both of these conclusions, plainly not regarding them as inconsistent; but the conflict of view revealed by the cases cited in Judge Hickenlooper's opinion shows that the two conclusions are not easy to reconcile."

In

Standard Life and Accident Co. vs. Thornton, 100 Fed. 582,

Judge Day, later Mr. Justice Day, in discussing the presumption against suicide, said:

> "This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. *It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony.*" (Italics supplied.)

Counsel next cite cases decided by the Circuit Court of the Ninth Circuit, in which they claim the rule as announced in this case was disapproved. Again we invite the Court's attention to the decision of Mr. Justice Denman, which we believe answers the contention of counsel for petitioner herein. Counsel, in support of their contention, quote from the case of

> New Amsterdam Casualty Co. vs. Breschini, 64 Fed. (2d) 887,

but as was said by Circuit Judge Denman, the Court there held that the evidence established suicide, and required an instructed verdict for the insurer. Hence, the instruction concerning the burden of proof should not have been given, but a verdict should have been instructed for the defendant.

In a later case from this Circuit

> Wells Fargo Company vs. Mutual Life Ins. Co., 66 Fed. (2d) 890, 893,

the Court in its decision cited with approval the decision of

> Travelers' Insurance Co. vs. McConkey, 127 U. S. 661,

and affirmed a judgment for the plaintiff.

Another case to which we desire to call the Court's attention is

New York Life vs. Miller, 81 Fed. (2d) 263 (decided Dec. 9, 1935),

in which the Court of Appeals for the District of Columbia says:

> "It is settled law that a suicide clause in a policy of insurance must be given effect according to the terms of the contract, but, being an affirmative defense, the burden of proof is upon the insurance company, and the evidence on this point must outweigh the evidence of the plaintiff, citing
>
> Home Benefit Ass'n vs. Sargent, 142 U. S. 641."

We have thus far discussed decisions from this Court and from Circuit Courts of Appeal. In view of the position assumed by petitioner we believe it important to invite attention to the statutes of Montana regarding presumptions, as well as decisions construing the same.

Our statute declares the disputable presumption:

> "That official duty has been regularly performed."
> Sec. 10606 (15) R. C. M. (1935.)

Presumptions are classified as indirect evidence.

Sec. 10600 R. C. M. (1935.)

The Supreme Court of Montana in considering the foregoing presumption, said:

> "While this is a disputable presumption, it has the *effect of evidence.*" (Italics supplied.)
>
> State vs. District Court, 72 Mont. 213, 232 Pac. 201, 203 (3)

and in

Union Bank & Trust Co. vs. State Bank, 103 Mont. 260, 62 Pac. (2d) 677, 684,

our Court said:

> "We recognize the rule that a presumption has the effect of evidence and that whether sworn testimony to the contrary is sufficient to rebut it is a question for the triers of fact."

Our code further declares:

> "The jury, subject to the control of the Court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions.
>
> They are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number, or *against a presumption* or other evidence satisfying their minds." (Italics supplied.)
>
> Sec. 10672 (2) R. C. M. (1935.)

Our research does not disclose any interpretation of the foregoing statute by the Montana courts, but California has an identical statute, and in a very early case had occasion to consider the effect of this provision in the case of

People vs. Milner, 54 Pac. 833, 837; 122 Cal. 171,

wherein it is said:

> "By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the

declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the fact—*First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it.* It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled." (Italics supplied.)

The foregoing rule was quoted with approval in

Reclamation Dist. vs. Sherman, 105 Pac. 277, 285 (Calif.), 11 Cal. App. 399.

In concluding this phase of our brief we urge that the decision of the Circuit Court of Appeals herein is in accord with the cases of

Travelers' Insurance Company vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691;

Pythian Knights Council vs. Beck, 181 U. S. 49,

and particularly do we urge that the language of the Circuit Court of Appeals in

New York Life Insurance Company vs. Ross, 30 Fed. (2d) 80,

applies to the facts herein. The foregoing cases are conclusive against the contention of petitioner herein.

The foregoing discussion has been upon the merits. We now desire to urge upon the Court that petitioner is not entitled to urge error in the giving of the instructions for the reason that exceptions thereto were not taken within the presence of the jury as provided by the rules of this Court and those of the Circuit and District Courts.

In connection with these objections we invite the Court's attention to the proceedings had upon the trial of this case.

Upon the close of the evidence and to guide counsel in their arguments to the jury, the Court advised counsel what instructions it intended to give upon the main issues involved in the case. The proceedings had thereon are found (pages 244-248 R.).

These proceedings were in no wise statutory or in compliance with any rules of court, and any exceptions taken thereto are without avail to appellant upon this appeal.

After argument by counsel (253 R.), the Court instructed the jury, which said instructions are found on pages 253-268 R. Thereafter the record shows the following proceedings as having taken place:

"Immediately after the Court had directed the jury to retire in charge of the bailiff, and as the jury was leaving the box, J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exceptions to the charge of the Court. Mr. Poore answered, 'Yes, your honor,' and immediately and while the jury was retiring, proceeded to and did commence to dictate into the record, but did not conclude the fol-

lowing exceptions to the charge of the Court." (269 R.)

From this it will be seen that any objections made or exceptions taken, while commenced while the jury was leaving the jury box, were not taken in the presence of the jury. The plaintiff served her objections to a consideration by the Court of any exceptions taken by counsel for defendant by moving to strike from the bill of exceptions all reference to the settlement of the instructions which motion was by the Court denied (313 R.), and also proposed amendments to defendant's proposed bill of exceptions, which said amendments would have eliminated from said proposed bill of exceptions all reference to exceptions or objections in the instructions of the Court (317 R.), and which said amendments to the proposed bill of exceptions were likewise refused and denied by the Court (317 R.). Plaintiff duly served, filed and had settled her bill of exceptions to such Orders of the Court. (312-318 R.).

In this connection we invite the Court's attention to the Clerk's minute entry showing the actual facts (320-321 R.). This minute entry reads, "Thereupon, after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict.

"Defendant thereupon renewed its exceptions heretofore made." * * *

The foregoing facts conclusively establish that petitioner is not entitled to urge as error any objections or exceptions to the Court's instructions. In this connection we invite the Court's attention to the following rules:

RULES OF COURT

The rules of Court applicable are Rule 8 of the Rules of the Supreme Court of the United States.

Rule 10 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Rule 58 of the Rules of Practice of the United States District Court of Montana, which reads:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, *before the jury have retired to consider of their verdict,* that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

Rule 75 of the Rules of Practice of that Court provides:

> "In settling the bill the Judge * * * must strike out of it all irrelevant, unnecessary, redundant * * * matter."

In

> Simkins Federal Practice (1934), section 178, at pp. 132, 133,

it is said:

> "Exceptions to a charge, given or refused, must be taken before the jury retire. The trial judge is under no duty to recall the jury to permit exceptions to be taken, and *cannot waive the requirement. Exceptions taken after the jury retire are too late.*" (Italics supplied.)

COURT DECISIONS

Fasulo vs. United States (C. C. A. 9th), 7 F. (2d) 961;
Howland vs. Beck (C. C. A. 9th), 56 F. (2d) 35;
Seabolt vs. U. S. (C. C. A. 4th) 44 F. (2d) 169;
Eldred vs. U. S. (C. C. A. 4th) 44 F. (2d) 170.

In

Fairmount Glass Works vs. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439, 53 S. Ct. 252,

the Court said:

"Under the rules of both the Court of Appeals and this Court, *the exception taken after the jury retired came too late to furnish a basis for review.*" (Italics supplied.)

See also

Tannin Co. vs. J. F. Moser Co., 288 Fed. 725, 730.

In

8 Enc. of Plead. & Pract., 264,

the rule is stated:

"Exceptions to instructions given should be taken at the close of the charge and *before the jury retires,* otherwise, they will be too late."

This rule was cited with approval in

Rumley vs. U. S., 293 Fed. 532, 556;
Cudahy Packing Co. vs. Luyben, 9 Fed. 32, 36;
Miller & Lux vs. Petrocelli, 236 Fed. 846, 852.

In

Greene vs. U. S., 154 Fed. 401, 412,

is found a review of the authorities in which the question here involved was under consideration, and in the course of its opinion the Court said:

> "In reference to the general rule requiring exception to a charge to be taken before the jury leave the bar, it is said that *'the rule is mandatory. Its enforcement does not rest in the discretion of the lower court.'* "

Some contention will probably be made that the action of the trial Judge in advising counsel regarding the instructions he would give or would refuse to give and informing counsel that if they had any exceptions they should be taken at that time misled counsel, but, we submit, that the trial court could not waive rule 10, and in this connection we call the Court's attention to the following cases:

In

St. Clair vs. United States, 154 U. S. 134, at page 153,

the Supreme Court of the United States held that:

> "What is necessary to be done * * * in order that the action of the trial court upon any particular question or matter may be reviewed 'depends upon the acts of Congress and *the rules of practice* which this Court recognizes as essential in the administration of justice. Such is the result of our decisions." (Italics supplied.)

> "The question of the method of reserving exceptions as a basis for a writ of error on appeal in the Federal Court is one dependent *upon the rules established* in the Federal Courts." (Italics supplied.)

Swift & Co. vs. Daly, 44 Fed. (2d) 40.

TRIAL COURT MAY NOT WAIVE ENFORCEMENT OF RULES OF APPELLATE COURT.

In

Allison vs. Standard Air Line Inc. (1933) 65 F. (2d) 668,

it was held that the trial court could not waive rule 10, supra, of the Circuit Court of Appeals for the Ninth Circuit. The Court said:

> "It is true that in the instant case the Court invited counsel to state their exceptions 'in as informal a manner as you wish.' There are two answers, however, to any argument that may be based upon this ill-advised concession on the part of the court: First, lack of formality does not mean lack of clearness, and, second, *the lower court has no power to waive the enforcement of the rules of this court.* (Italics supplied.)

See, also,

Merchants' Exchange Bank vs. McGraw (decided 1896) 22 C. C. A. 622, 76 Fed. 930, at pp. 935, 936.

Western Union Tel. Co. v. Baker (decided 1898) 29 C. C. A. 392; 85 Fed. 690.

Arizona & N. M. Ry. Co. v. Clark (decided 1913), 125 C. C. A. 305, 207 Fed. 817, at pp. 823, 824.

Petitioner will contend:

(1) That having commenced its objection to the charge before the jury retired this was a compliance with the rule;

(2) That the action of the trial court in advising that exceptions should be taken at that time, waived the en-

forcement of the rules that the objections should be taken before the jury retired.

In effect, petitioner contends that the phrase *"before* the jury retires" appearing in the above rules of court means *"after* the jury retires" or "during the time the jury is retiring," or *"during* the time the jury is considering its verdict," or *"before* the jury is discharged."

The above rules of court are clear and explicit.

When the Supreme Court of the United States says "before" it means "before"—not "after."

When the Circuit Court of Appeals directs that the excepting must be stated *"before* the jury retires" it does not intend thereby *"after* the jury retires."

When this Court, in its rules ordered the parties to state their exceptions "to the Court, *before* the jury have retired to consider of their verdict" it did not order nor intend to order that such exceptions may be stated to the Court *during the time the jury is retiring* or *after* the jury have retired to consider of their verdict.

Before the jury retires is a different time than *after* the jury have retired.

"Before the jury retires" simply means preceding in time or previous to the time when the jury shall have retired to consider of their verdict.

The rules using the phrase "before the jury retires" most certainly may not be construed to mean *after* the jury have retired or subsequent to the time when the jury have retired.

It is clear that the rules of court require that the exceptions to the charge be stated before the jury retires from the court room. It is certain that the petitioner

herein neglected and failed to state its exceptions to the charge herein until after the jury had retired.

Such exceptions were not timely stated and neither the oral charge nor the purported exceptions thereto should have been inserted in the bill of exceptions and petitioner should not, under the circumstances, be heard to urge error in the giving of instructions.

In concluding our brief, respondent contends that the decision of the Circuit Court of Appeals herein was and is in accord with the law as announced in

Travelers' Insurance Co. vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691,

that such rule of law has never been modified, or overruled, and because the same has remained as such during the intervening years the rule of "stare decisis" compels the denial of the petition herein.

A rule of law once fixed by the Court should be firmly adhered to unless clearly erroneous.

Gilman vs. Philadelphia, 3 Wall. 713.

In addition, we further contend that this Court, under facts almost identical with those here presented, has refused to review the action of the Circuit Court of Appeals of the Sixth Circuit in following the rule as announced in Travelers' Insurance Company vs. McConkey.

See

New York Life Ins. Co. vs. Ross, 279 U. S. 852,

which should preclude petitioner herein from again presenting the identical question presented in said case.

And lastly—petitioner, by failing to follow the rules of this Court, the Circuit Court of Appeals and District Court in saving its exceptions to the charge of the court, was without right to urge as grounds for reversal of the judgment herein, error, if any, in the Court's instructions.

The petition herein should be denied.

Respectfully submitted,

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Service of the within and foregoing Brief by copy admitted this.....day of September, 1937.

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Attorneys for Petitioner.

No. 323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased.

Respondent.

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased.

Respondent.

BRIEF OF RESPONDENT

We believe respondent can better serve the Court by presenting her argument in the following order:

1. A discussion of the facts as disclosed by the pleadings and the evidence.

2. A discussion of the law presented by petitioner, as well as such authorities as we regard not only persuasive but conclusive of the correctness of the decision of the Circuit Court of Appeals herein.

In our discussion of the facts it becomes necessary to

indulge in some repetition of facts discussed in the Brief of Petitioner, but wherever it is possible such repetition will be avoided, and we will endeavor to so condense the facts that unnecessary space will not be consumed or unnecessary labor imposed upon the Court. In our presentation of the facts we believe we can best serve the Court by first giving our conception of what the evidence shows, and secondly, by discussing the conclusions regarding the effect thereof as urged by counsel for petitioner under the title,

ARGUMENT

An additional word of explanation is offered because we are presenting our argument in the order heretofore announced,

We have been informed by counsel for petitioner that they do not intend to file any brief other than those heretofore filed in support of the petition for a Writ of Certiorari herein. Inasmuch as the brief filed by respondent in opposition to the issuance of such Writ contains no discussion of the facts, and the citation of only a limited number of cases regarded as applicable, we believe it necessary that an additional brief be filed by respondent, in which a further review of both facts and the law may be brought to the attention of the Court.

In the brief of counsel for petitioner they first discuss the law and thereafter the facts. We believe it best that our discussion proceed in the reverse order, and we shall so do.

UNDISPUTED FACTS

The record herein discloses the following undisputed facts: E. Walter Gamer, at the time of his death was 51 years of age; approximately 5 feet 10 inches tall; weighed approximately 180 pounds; was possessed of a jovial disposition, was regarded by his friends as being a congenial, cheerful person; his home life was at all times ideal; he was the father of one child, Elsie Jane Gamer, who at the time of his death was 11 years of age. Mr. Gamer's family life was very happy, and he was devoted to his wife and daughter. His daughter was his pal. Mr. Gamer was strong physically; his health was of the best, and he was a man who enjoyed outdoor life and frequently would go fishing and at times hunting.

Whenever he would go fishing he always carried a gun—sometimes a shot gun; other times a revolver, and at times a rifle. Upon occasions he was known, when on fishing trips, to have taken with him the rifle from which the shot here in question was fired. This rifle was a 300 model 99 Savage rifle, the muzzle velocity of which was and is 2700 feet per second, and the muzzle energy of the 150 grain bullet used in said rifle at the muzzle was 2430 pounds, meaning that the bullet fired from the rifle at the time it leaves the rifle would have a muzzle energy in foot pounds of 2430, which as we understand it, means the force and energy would be sufficient to raise 2430 pounds vertically one foot, or sufficient to raise one pound 2430 feet at muzzle velocity.

Mr. Gamer's body was found on the morning of April

10, 1933, in a clothes closet leading from the bedroom of his home, which clothes closet was 5 feet 10½ inches long and 2 feet 3½ inches wide, the door leading from the bedroom thereto, was 23¾ inches wide, and the ceiling was 8 feet 9¾ inches from the floor. When Mr. Gamer's body was found, his legs to his knees were in the closet, and the rest of his body in the bedroom, the entrance to the closet being on the west side thereof, and the length being easterly and westerly. When the body was found Mr. Gamer was lying on his back with his head toward the west and his feet toward the east. He was fully dressed in clothes worn by him on fishing and hunting trips.

The night before, a visitor at the house, who remained until 10:00 o'clock p. m., found Mr. Gamer apparently in good health, very jovial, and particularly happy because he contemplated again going into business. (81 R.)

The Gamer home was a two story residence, the bedroom and closet in question being on the second floor, while the kitchen, dining and sitting room were on the first floor, underneath of which there was a basement, also used as a laundry. On the morning of his death Mr. Gamer came down stairs at about 9:30 o'clock and remarked to his wife and daughter, "I think I'll go fishing." (136 R.) He was dressed in his fishing clothes. When he came down stairs he did not have a hat on his head or in his hand. (137 R.) *When his body was subsequently found, his head was in a hat.* (Italics supplied.) (See testimony of Gillis, 41, 51 R.; Anderson, 80 R.; Cumming, 86, 95 R.; Murphy, 103, 108 R.; McHaffey, 155 R.)

Mr. Gamer engaged in conversation with his wife and daughter, and all three had breakfast together. He ate his usual breakfast consisting of "some fruit, two eggs, two cups of coffee, and two pieces of toast." (137 R.) After serving Mr. Gamer his second cup of coffee his wife went down stairs to do some washing, and while so engaged heard their daughter and Mr. Gamer talking and laughing up stairs, the daughter washing the dishes, and Mr. Gamer drying them. This consumed approximately twenty minutes or a half hour. Thereafter, Elsie Jane, the daughter, went to the basement to help her mother with the washing, while Mr. Gamer, following his usual habit and custom, sat in the front room reading the morning paper. He remained there approximately a half hour, when his wife heard him going up stairs. (138 R.) Subsequently, when a call came for Mr. Gamer, his body was discovered in the position and at the place hereinbefore described.

The rifle was kept in the closet adjoining the bedroom, wherein was also kept a shot gun and his fishing outfit, as well as his other clothes (138 R.), Mr. Gamer also had a pistol, a 22 Colt's automatic, in the closet, which was kept on the shelf to the left as you enter the closet. This pistol was loaded and was kept as protection for Mrs. Gamer and Elsie Jane when they would be alone in the house as a result of Mr. Gamer going fishing or hunting. (139 R.) It was on the shelf in the closet, fully loaded with eight shells, on the day of Mr. Gamer's death. (118, 139 R.) This was where it was always kept. (119 R.) Mr. Gamer had repeatedly warned his

daughter not to go in the closet because he had guns in there. (120, 121 R.) This closet was crowded, and it was very difficult to move around therein. (140 R.). There were shelves on either side and in the rear end of the closet, and clothing hanging on both sides of the closet and on the end wall; also a pole on which clothes were hanging. (42, 85, 107 R.)

Mr. Gamer left no note or message. (112, 121, 140 R.) Mr. Gamer made no complaint to his wife about financial difficulties (140 R.), neither did he make any complaint to his friends of any such difficulties. (84, 130 R.) A week or ten days before his death Mr. Gamer purchased two suits and an overcoat. (88, 96, 121, 140 R.) The Saturday evening before his death Mr. Gamer, accompanied by his wife, had attended a dinner and card party in conjunction with other members of a card club, and was in the company of the members of said club from 7:00 o'clock in the evening until 1:00 or 1:30 Sunday morning. There he showed no change in his disposition. He was cheerful. (129 R.) On the afternoon of the day before his death about 4:00 or 4:30, Mr. Gamer was in the company of a friend of many years standing. His disposition seemed fine, and Mr. Gamer was in a cheerful and happy frame of mind. (131 R.) He tried to induce this friend, P. E. Geagan, to go fishing with him the following day. "He told me he was going fishing on Monday." (131 R.) Mr. Gamer was quite insistent that Mr. Geagan accompany him on the fishing trip. (131 R.) He had also tried to induce another friend to go fishing with

him the beginning of the next week. (116, 117 R.)

The pistol or revolver to which reference has hereinbefore been made was found after the death of Mr. Gamer on the upper shelf of the north side of the closet in which Mr. Gamer's body was found. (118 R.)

Mr. Gamer had no upper natural teeth, but used a denture composed of 14 teeth, which was held in Mr. Gamer's mouth by suction and moisture. He had six natural teeth in his lower jaw, to which were attached a partial removable appliance of four teeth. This was known as a removable denture or plate. (173 R.)

At the time of Mr. Gamer's death, and for many years prior thereto, he had been the owner of a 5/12 interest in the Gamer Confectionery, Inc., a confectionery business and cafe in the City of Butte, which business had been destroyed by fire in October, 1932. The company received $32,000.00 fire insurance, and about $7500.00 use and occupancy insurance. On April 25, 1933, the company had a bank balance of $10,394.57, was the owner of 50 shares of First Bank Stock Corporation of the value of approximately $7.00 to $10.00 per share; also notes receivable $144.99; accounts receivable $449.88; salvage in furniture, fixtures and equipment carried on the books of about $5900.00 (71 R.), or a total of $16,788.87. (72 R.) This did not include *Good Will.* (75 R.) During the year 1932 Mr. Gamer's income tax return showed his personal gross income to be $11;493.43, of which $4,166.85 consisted of salary, and $7531.97 dividends, all but $31.97 of which were dividends from Gamer Confectionery, Inc. (73 R.) Mr. Gamer

had the right to draw checks upon the $10,394.57, being the bank balance of Gamer Confectionery, Inc., at the time of his death. (70 R.)

After Mr. Gamer's death, and in the preparation of body for burial, the upper plate fitted into his mouth normally. (32 R.) The upper gum was not lacerated. (63, 146 R.) There was no wound or laceration on the lower gum. (147 R.) The upper plate was not injured in any way. (58, 62, 147 R.) The back of Mr. Gamer's head was badly shattered or blown out about the joint of the parietal bone of the skull, which opening was about 3½ inches. (60 R.) He had a laceration on the upper left side of the lip about 1/8 or 2/8 of an inch from the left corner of the mouth, which extended upward on the upper lip and was about ½ inch long (61 R.), from which there was no missing skin. It was held together by muscle fibre. (63 R.) The edge of the lower bridge or plate in Mr. Gamer's mouth, at the time his body was found, was sticking out with the teeth turned outward. (58 R..) There were three fractures on the right side in the middle of Mr. Gamer's lower jaw. (65 R.)

The shells for the rifle in question were kept in the bedroom adjoining the closet where his body was found. (98 R.) When the rifle was examined immediately after the death of Mr. Gamer there was but one empty shell in the gun. (88 R.) The rifle in question had been carried by Mr. Gamer on different fishing trips. (41, 43, 49, 87, 88, 118, 125, 130 R.) The testimony also shows that while Mr. Gamer's habits with fire arms were careful, "he was jumpy." (121 R.)

The "Double Indemnity Benefit" provided for in the policy was not a gratuity on the part of the insurance company, but an annual premium of $10.00 was paid by decedent. (11 R.)

The tender to respondent of the face value of the policy was conditioned upon the surrender by her of the policy and the signing of a receipt accepting said sum *"in full settlement of all claims under policy."* (196 R.) (Italics supplied.)

The foregoing facts are all undisputed.

We now invite the Court's attention to some facts concerning which there is some slight dispute. We refer to the testimony regarding where Mr. Gamer's glasses were found. One witness testified they were 16 to 18 inches from the door of the closet. (42 R.) Another witness testified they were inside of the clothes closet close to Mr. Gamer's feet. (103 R.) Another witness testified they were alongside of the plate, which was on the north side of Mr. Gamer's body at about the calf of his leg. (119 R.) Inasmuch as the testimony shows that Mr. Gamer's legs, from his knees down, were in the clothes closet, it will be observed that the location of the glasses is placed at about the same position by the foregoing testimony. The only contradiction of this is the testimony of the doctor who testified the false teeth and glasses were in the far end, the east end, of the closet. (151 R.) The testimony with reference to the plate is that it was about 12 inches or about 16 or 18 inches from the door of the closet. (53 R.) The cor-

oner, Con Murphy, testified that they were just inside the closet, being handed to him by Dr. McHaffey. (103 R.) Mr. Davis testified they were just inside the entrance of the closet, about the calf of Mr. Gamer's leg (119 R.), while Dr. McHaffey testified they were at the far or east end of the closet. (151 R.) Thus again, it will be noticed three witnesses agree the plate was just inside the closet door, while one witness places it at the extreme or easterly end of the closet.

In this connection we invite the Court's attention to the fact that there were old clothes and shoes in the back part of the closet on the floor. (118 R.)

At the time of the discovery of Mr. Gamer's body a hole in the ceiling of the closet was observed. The location and dimensions, as well as the character of the hole, is somewhat in dispute. One witness testified that the hole was "just inside of the closet, and it would be about in the center of the north and south side of the closet over the door. That bullet hole was sort of an oblong hole; it was larger at one side than at the other; it was irregular in the ceiling. In my best judgment it may be eight or 10 or 12 inches or some such matter, in from the door of the clothes closet." (52 R.) Another witness testified, "I saw the hole in the ceiling. That hole was kind of an oblong hole and had a lot of blood and stuff around it; the hole was longer than it was round; it appeared to have been recently made." (32 R.) Another witness said, "I saw a bullet hole in the ceiling of the closet, and it was close to the door. I would say it was maybe 18 inches, to the best of my judg-

ment, from the door, or something like that, but, of course, I didn't measure it. I couldn't state which wall it was close to; it looked kind of around the center. That was a plaster ceiling; as I recollect, the bullet hole was a hole about the size you could *push a lead pencil in.* (Italics supplied.) There was some blood and flesh surrounding this hole." (107 R.) Another witness testified, "That hole in the ceiling was mid-way between the north and south wall and about one foot in from the door, I would say; that would be about one foot east of the door entering into the closet. That was a plaster ceiling. I would judge the size of that hole to be about the size of a *twenty-five cent piece.*" (Italics supplied.) (151 R.)

With reference to the gun and its position, the testimony is likewise in conflict. It was testified, "When I saw the gun this morning when I went to the Gamer home, it was lying parallel with the body, with the muzzle pointing west. Mr. Gamer did not have hold of the gun; the gun was lying outside of his hand; his hand was next to his body, and the gun next to his hand." (42, 46 R.) Merle Davis testified, "I saw this rifle, plaintiff's exhibit 1, there that morning, and to describe where it was, Walter's feet were separated, I would say about a full foot, the butt of the rifle between his feet and slanted up this way across his body with the barrel pointing west and south, a little south and diagonally west. He did not have a hold of the gun with either hand." (119 R.) The witness McHeffy testified, "The stock of the gun was between the feet

of Mr. Gamer, and he was holding the barrel of the gun in his left hand. The left hand was just slightly above the crotch clutching the barrel of the rifle; the left hand was just above the crotch, about in here. I am laying my hand on my body about a little below the navel, and in that hand he held the barrel of this gun; the hand was held just about an inch or two from the muzzle; the stock of the gun was between his feet; his right hand was across the chest." (149, 150 R.) Coroner Murphy testified, "When I got there the right hand of Mr. Gamer was down by his side; the gun was off this way a little; the hand up this way; the muzzle of the gun here was pointed across the body, and that would be the southwest direction, mostly west."

Q. In describing this gun, the hold that Mr. Gamer had on the gun, how far beneath the sight——

A. I would say it was down about six inches; the hold was like that.

THE COURT: With the left hand?

A. In the left hand like if the gun was being packed this way, it was just like that.

Q. With the thumb on the upper——

A. Well, like that.

Q. Now, did he have a tight or loose hold?

A. I just loosened his fingers and took the gun right out. *I would say it was a loose hold. I don't think there was any blood on the gun.* (102 R.) (Italics supplied.)

This conflict or discrepancy regarding the position of the gun cannot be explained by any contention that Dr. McHaffey was first on the scene, having arrived before

Mr. Davis, Mr. Gillis and the coroner. Such was the fact, but as Dr. McHaffey testified, "I was the first man there as far as I know. I don't think anything was disturbed in that closet from the time I got there until the coroner arrived. I saw Mr. Merle Davis there; saw Malcolm Gillis there; saw them upstairs. I don't think anything in that closet was disturbed from the time I got there until they got there. I saw Mr. Cummings there. Nothing was disturbed when he got there. When I lifted up the head of Mr. Gamer that didn't disturb the gun; didn't move the body; it didn't move the body picking up the head. I didn't move the body at any time.

The condition and position of the gun and body, the position of the body and gun at all times I was there, was undisturbed until it was removed by the undertaker." (154 R.)

The testimony also shows without any contradiction that when the rifle was found there was no blood upon it. (88, 119 R.)

A cigar stub was found upon the window sill on the south of the clothes closet. (42, 47, 99, 107, 109, 120 and 151 R.) It gave every appearance of having been recently smoked. (109, 120 R.)

There is further uncontradicted testimony that Mr. Gamer, on the Friday previous to his death, had made an appointment to meet Mr. Gillis on the morning of April 10th, at 11:30 a. m. (44 R.), This engagement related to a fraternal question and was unimportant and could well have been postponed to any time. (54 R.)

In the policy of insurance there was contained this provision: "The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law." (11 R.) No such autopsy was made or attempted.

In the foregoing analysis of the evidence we have not attempted to give the testimony of each witness in detail, but have confined ourselves to a review of such testimony as would be of aid in a determination of the issues.

We shall now analyze and comment upon the argument of counsel under the heading

"THE PHYSICAL FACTS SHOW SUICIDE"

(Petitioners brief, p. 43.)

Counsel first refer to the witness Clyde McNeil as a ballistic expert. No such pretentions were made by the witness, whose qualification as an expert of any kind consisted only of having clerked in various stores in Butte, Anaconda, and Missoula, Montana, for a period of approximately 20 years, during which time he had charge of sporting goods departments, in which were handled different makes of guns, and as a part of his duties repaired guns, tested guns for accuracy and also for penetration. (198 R.) With reference to the testimony of this witness regarding experiments, counsel emphasized the fact that these experiments were made at the request of counsel for respondent; however, the witness also testified that he was interviewed at the time of the first trial by the defendant, but was not subpoenaed

as a witness by either party. (222 R.) With reference to the distance at which powder marks would show on flesh, he stated, *"I really don't know at what distance powder marks would show on flesh."* (Italics supplied.) (222 R.)

Counsel claim that Mr. Gamer was right-handed, and the gun was clasped in his left hand about six inches below the sight. They further conclude that the butt of the gun was on the floor when the shot was fired; otherwise the recoil would have kicked or dislodged it from his grasp. The witness Gillis testified that Mr. Gamer did not have hold of the gun. (46 R.) Similar testimony was given by the witness Davis (119 R.), and while it is true that the witness Murphy testified that Mr. Gamer had a loose hold on the gun (102 R.), as did Dr. McHaffey (159 R.), the doctor testified that Mr. Gamer's hand was about an inch or two from the muzzle (150 R.), while the coroner testified that it was six inches below the sight. (102 R.) The testimony of Mr. McNeil then is that if the gun was held in the hand and the person attempted to put the muzzle in the mouth and then pulled the trigger, the recoil would throw the gun some distance away. (219 R.) Counsel, however, contend that the gun was upon the floor and held in the left hand of Mr. Gamer, and he pulled the trigger with his right hand. This contention is disputed by the physical facts. Furthermore, had Mr. Gamer so held the gun in contemplation of killing himself, well recognized authorities assert, that in such event, the hold of Mr. Gamer on the gun when his body

was found would have been tight and firm, and would have required considerable effort to loosen it.

In this connection, and in support of our contention, we invite the Court's attention to

> Vol. 1, Legal Medicine and Toxicology, by Haynes, Peterson and Webster, 2nd Ed. p. 332,

wherein it is said:

> "If a weapon is tightly clasped by the hand of the dead man, suicide is practically certain."

and on page 335, the authors say:

> "If tightly clasped, it is excellent evidence of suicide, as already mentioned."

Counsel next contend that the bullet hole in the ceiling shows that the gun was fired at approximately a right angle to the floor of the closet. The exact location of the hole is a matter of dispute among the witnesses. One witness placed it eight or 10 or 12 inches from the door; a sort of oblong hole, larger at one side than at the other, and irregular. (52 R.) Another witness described it as an oblong hole, longer than it was round. (82 R.) Another witness placed the hole at 18 inches from the door and about the size you could push a lead pencil in (107 R.), while still another witness described the hole as being midway between the north and south wall one foot east of the door entering into the closet, and the size of the hole to be about the size of a twenty-five cent piece. (151 R.)

Upon the first appeal of this case

> Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543,

Judge Wilbur stated, *"A single hole in the ceiling of the closet would not indicate the position of the gun or the insured's head at the time of discharge.* (Italics supplied.) The size of the bullet hole would make it clear that it did not strike the ceiling perpendicularly, for in such case the size of the bullet hole would be the same as the calibre of the rifle, 3/10 of an inch, unless it be assumed that the bullet mushroomed as a result of the contact with the skull of the deceased. There is no evidence that under such circumstances such a bullet would mushroom."

The testimony with reference to the location of the hole was identical upon the second trial with that given at the first trial. With reference to the mushrooming of the bullet, the witness McNeil testified as to certain makes of bullets mushrooming (203, 209, 217 R.), but in this connection it must be observed that he was speaking of a bullet such as he had sold the decedent some seven months prior to the time of decedent's death. The shell of the bullet was not available at the trial (106 R.), and the record fails to disclose the kind of bullet which caused the death of Mr. Gamer. Furthermore, Mr. McNeil's testimony refutes the statement of counsel regarding the significance of the bullet hole in the ceiling. The witness states, "A hole in the ceiling, being an oblong condition, or oblong hole, would not indicate anything to me. It would not have any significance in determining the position of the rifle at the time it was discharged. The only thing it would indicate to me would be that the bullet might be deformed. It

would not indicate the distance from the object originally struck or first struck that the rifle was held.

Q. So that the hole in the ceiling, being made after it struck an intervening object, would not aid you in determining the distance at which the rifle was held from the original object struck?

A. I couldn't say that, no sir.

I mean that it would not have any significance in determining that matter." (217 R.)

We shall now make brief reference to the testimony of Charles R. Leonard, one of counsel for petitioner regarding a demand to inspect and survey the closet in the Gamer house. This demand was made October 25, 1935 (158 R.), almost two and one-half years after the death of Mr. Gamer. That the demand is and was unauthorized must be conceded. The facts are that when the demand was made the house was rented (163 R.), and upon request by Mr. Leonard he was furnished with the name of the tenant. (164 R.) No court order for such inspection was requested. (164 R.)

Prior to the first trial of this case an *oral request* was made by counsel for petitioner for leave to inspect the premises, which was granted, and an inspection and map of the closet made (165, 166 R.), also in response to a further *oral request* by counsel for petitioner, a couple of days later a further survey of the bedroom and closet was made. (167 R.) An *oral request*, before the first trial, was likewise granted. (168 R.)

It is not without significance that all requests for inspection of the premises or the rifle, before the first trial, were made orally, and as readily granted as asked. Why then the formality in making the unusual request prior to the second trial? The question suggests the answer. It had no sanction in law and was made with the hope it would be refused and the refusal brought to the attention of the jury in the hope it would prejudice respondent. It will not suffice as an answer to say we could have objected to Mr. Leonard's testimony because to have done so would have placed us in a false position before the jury, namely, of trying to suppress testimony. We followed the only logical plan, namely, to have placed all the facts in the possession of the jury.

We have perhaps attached too much prominence to this testimony, but we feel justified in so doing because we did not want this Court to entertain the thought we were guilty of trying to suppress testimony.

It is next contended by counsel that the deceased was always careful with a gun. This is true, but he was likewise jumpy (121 R.), and while the trigger pull on the rifle in question was 3½ pounds, this was regarded by the witness McNeil as an easy pull. (213 R.)

Much is said by counsel regarding the upper set of teeth and its being found upon the floor at the time Mr. Gamer's body was found. They contend that if he took them out he tossed them in the closet. Their position is somewhat in dispute. Dr. McHaffey testified they were in the far or east end of the closet (151 R.), but every other witness testified they were just inside

of the closet entrance. (42, 55, 57, and 103 R.) If the testimony of Dr. McHaffey is correct it may be inquired, how was it that the plate was not found among the shoes and clothes which were laying around the floor of the closet? (118, 152 R.) We believe it a fair assumption from the testimony that Mr. Gamer's upper plate and his glasses were found just inside of the clothes closet. If we are correct in this assumption, there can be no question but what the glasses were knocked from his nose and the upper plate from his mouth by the force of the explosion. If the gun was in the mouth, the explosion would have destroyed the upper plate, and the force thereof would have likewise destroyed the glasses. The fact that the glasses were not injured, except the nose piece, establishes almost beyond question that the gun was not in the mouth. On the other hand, if the denture was in the mouth, and Mr. Gamer inserted the rifle therein, causing it to explode while in the mouth, the shock would have destroyed the denture. (175 R.) If, on the other hand, the denture was removed, can it be seriously contended that the muzzle of the rifle was in the mouth, with its terrific discharge and the flame resulting therefrom (204, 207 R.) would not burn or sear the interior of the mouth? (See also testimony of Dr. Shields, 191 R.), whereas, the testimony here is that the upper gum was not burned, seared, or lacerated (63, 146 R.), and that there was no wound or laceration on the lower gum. (157 R.) The witness McNeil also testified that a bullet from the rifle in question fired into the mouth at a dis-

tance of 14 inches would not be as destructive as if it were placed in the mouth and fired; also that a bullet discharged from such a rifle at a distance of 14 inches would be of sufficient force "to tear out the back of the head, but as far as the other tissues and parts are concerned, I would feel it would be less likely to destroy any other membranes of the skull. The closer to the mouth, in my opinion, the greater the damage." (225 R.) Again, "If the muzzle were not in the mouth, if the muzzle was away a distance of 15 to 20 inches from the mouth the force of the blow would be sufficient to blow out the back of the head, but the damage to the other parts of the face or skull would be less great than with the muzzle in the mouth." (225 R.)

In view of this testimony it would seem futile to argue that the muzzle of the rifle was in Mr. Gamer's mouth at the time of its discharge. We realize that Judge Wilbur in his opinion upon the first appeal, said, "There is no trace of bullet or powder marks upon the face and no point of entry of the bullet shown upon the body, leading irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged."

The testimony of the expert McNeil was not before the Circuit Court of Appeals upon the first appeal of this case. His testimony, as hereinabove quoted, effectually establishes that at a distance beyond 10 inches from the face of the decedent, no powder marks would show upon the face. Our contention is that Walter Gamer, after reading the paper on the morning of April 10th,

decided to go fishing. He went upstairs for his hat, his rifle and fishing equipment; the hat being easily reached he placed it upon his head, reached for and pulled out the rifle from the rear end of the closet, and while pulling the rifle from where it was stored and while pulling it past the many clothes in the closet, many of which were hung on the pole stretched from the north to the south side thereof, some of the clothing caught on the trigger of the rifle, the safety not having been set, with the result that the rifle discharged and Gamer received the wound which resulted in his death.

The fact that no powder marks showed on Mr. Gamer's face is significant in view of the fact that the experts for petitioner were unable to state at what distance a bullet discharged from a rifle such as killed Mr. Gamer would show powder marks on the flesh. The witness McNeil couldn't tell at what distance powder marks would show on flesh (222 R.), while Dr. Kistler testified at 10 inches distance from the face it would not likely show any powder burns. (231 R.) It being testified by one of the experts that if the muzzle of the gun had been held in Mr. Gamer's mouth it would have blown off his entire head (R. 223-225), also that the rifle discharged in the mouth would burn or sear the flesh or tissues (R. 221, 191), and it appearing that the force of the explosion only destroyed the back part of the head, about the joint of the parietal bone of the skull (R. 60), without any searing or burning of the tissues in the mouth it is an irresistible conclusion that the rifle at the time of its discharge was more than 10 inches from the face of Walter Gamer.

The testimony shows that a cigar stub was found upon the window sill in the clothes close at the time of the finding of Mr. Gamer's body. It gave indication of having been recently smoked. If Mr. Gamer contemplated suicide, and was so careful regarding the cigar stub, why would he not have been equally careful regarding his plate and his eye glasses? Why did he not also place them on the window sill? This gives credence to our contention and clearly establishes that he was wearing the eye glasses and the plate at the time the rifle was discharged, and both were knocked to the floor by the force of the explosion. Regarding the lower bridge work, which was turned upside down and protruding from his mouth, there is no tetimony in the record indicating that the force of the explosion, if the muzzle of the rifle were held at a distance of 12 inches or more, would not be sufficient to force this bridge work outward as it was found; in fact, if the force of the explosion was sufficient to pull the upper denture out of the mouth, it gives credence to the contention that the wire which attached the lower bridge to his natural teeth prevented it from likewise falling to the floor.

With reference to the wound in the upper left lip, there can be no question but what it was caused by the protruding teeth; in fact, Dr. Shields, an expert witness for petitioner, so admitted. (188, 189 R.)

With reference to the three breaks in the jaw of the decedent, the testimony is that if the muzzle of the gun were held in the mouth, there would be no reason why

it should break the right jaw and not the left jaw. (193, 237 R.) Furthermore, these fractures could have been caused by the fall after injuries were inflicted. (237 R.)

Counsel next discuss the effect of 2430 foot pounds of muzzle energy being exerted instantaneously within the confines of a human mouth, saying such a force would result in blowing the mouth open. With this we agree, but contend that not only would it force the mouth open, but it undoubtedly would blow off the person's entire head.

It is contended that the gun was within the mouth of Walter Gamer when he fired the shot which ended his life, and that this was conceded by everyone except the trial judge. This statement, except insofar as it applies to the trial judge, is without any basis; in fact, not only upon the first appeal, but at all times, save when necessary for the sake of argument, the contention of counsel for respondent has been that the muzzle of the gun at the time of its discharge was not in the mouth of decedent.

The foregoing discusses, and, we believe, fully answers the various contentions raised by counsel for petitioner in their brief herein, save only the contention that Mr. Gamer at the time of his death was indebted in the sum of $14,711.50, which statement is based upon the fact that in 1932 Mr. Gamer paid interest in the sum of $882.69, which sum capitalized at 6% would show an indebtedness in the above sum of $14,711.50.

It is true that said interest capitalized at 6% would show such an indebtedness, but at the time of Mr. Gamer's death the legal rate of interest in Montana was 8% (Sec. 7725 R. C. M., 1921), and parties could agree to a rate of interest not in excess of 10%. (Sec. 7726 R. C. M. 1921.) At 10% the amount of interest paid by Mr. Gamer would show an indebtedness of $8826.90, and it would be a testimonial to a person's financial stability if, in 1932, he could have borrowed money in the City of Butte at less than 10%. No one in financial distress could have done so, and we believe general experience teaches us that a person able to borrow $14,711.50 at any rate of interest must either have adequate collateral or a very splendid credit, either of which negatives the idea the individual was suffering from financial troubles.

Mr. Gamer was a resident of Butte for many years before his death. His estate was probated in Silver Bow County. (4, 26 R.) If he had any indebtedness at the time of his death, claims would have been filed against his estate, and therefrom it could have been definitely determined the amount of his indebtedness at the time of death. The record is silent as to any indebtedness owed by Mr. Gamer. It does show that he paid an income tax in 1932 on an income of $11,493.43, and if it be true that he did owe $8826.90, which is the amount of interest he paid in 1932 capitalized at 10%, he could have paid said indebtedness and still retained almost $3000.00 during said year for his living expenses. Furthermore, the testimony of every witness

in this case is that there was no change in Mr. Gamer's disposition or demeanor during the latter years of his life. On the very morning of his death he ate his usual breakfast; he was jolly, good natured; he dried the dishes his daughter washed; he played with her, and then, as was his usual custom, went into the sitting room to read the morning paper. Are these facts consistent with those of a man contemplating suicide? The question not only suggests the answer, but effectually disposes of the contention that Mr. Gamer was harassed by financial difficulties. He still retained 5/12 interest in the Gamer Confectionery, which interest at the time of his death was worth in the neighborhood of $8000.00. He was drawing a salary during the entire time that the corporation was out of business, and the evening before his death expressed his happiness in knowing that a location had been secured and the corporation would soon again open.

We trust it will not be considered an imposition if we quote from additional testimony given by the witnesses McNeil and Kistler. We do so because it is upon their testimony so much reliance is placed by counsel for petitioner, and because we wish to show that such testimony has no great probative value because of admission made by said witnesses which are consistent with recognized authority. The witness McNeil concluded his testimony by the following admission: "Bullets don't act twice the same way, and even under a given set of circumstances they won't do the same thing." (227 R.) The witness Kistler testified:

Q. And the distance that the bullet will be deflected is entirely problematical?

A. Exactly, that is, the exact amount.

Q. So that it cannot be said with any degree of definiteness just how far a bullet will be deflected striking the occipital bone?

A. Not absolutely, no.

Q. You say it cannot be definitely stated how far a bullet will be deflected. Do you mean you could tell within 10 inches?

A. *I could if I knew the angle at which it struck and the material it struck and the distance away, which would measure your amount of deviation.*" (239 R.) (Italics supplied.)

The witness also testified with reference to the effect of the explosion of a gun, the muzzle of which was in the mouth of a person, regarding whether it would force the body backward or forward, and he answered "I cannot estimate exactly, because I don't know how far forward, or what the balance of his body was." (233 R.)

In connection with this testimony we invite the Court's attention to the following quotation:

> "A bullet might be battered by its first impact with bone and its further penetration considerably reduced or interfered with."
>
> "Rapid changes in powders and fire arms make it almost impossible to discuss the different phenomena associated with their discharge and the character of the wounds and the concomitant changes. Each case must be individualized."
>
> Vol. 1, Legal Medicine and Toxicology, by Haynes Peterson and Webster, 2nd Ed., pp. 337, 343.

We believe the foregoing constitutes a fair summary of the evidence. We may have been guilty of some slight repetition, but wherever this occurs the responsibility rests upon our desire to emphasize certain evidence which we regard as important in a determination of the law applicable to facts such as here presented.

The facts proved, as suggested by Judge Denman in his opinion, are not in their essence different from those presented on the first appeal. (328 R.) If there is any variance it will be found in the attempt by petitioner to supplement the testimony offered by it on the first trial by so-called expert testimony. Such testimony lost much of its value by the admission of the so-called experts that to form or express a definite opinion as to the matters upon which they were questioned it would be necessary to be given additional information regarding the distance from which the rifle was discharged, the position of decedent at the time of discharge and other similar facts. Without these they admitted their opinions were no more than conjecture or surmise. Did such testimony further fortify petitioner in its claim that Walter Gamer committed suicide? We think not, and invite attention to the language of this Court in

The Conqueror, 166 U. S. 110;

wherein it was held:

> "The ultimate weight to be given to the testimony of experts is a question to be determined by the jury, and there is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinion of such witness."

With the foregoing in mind we shall now present such additional authorities as in our opinion declare the law here applicable.

It is our contention that upon the trial plaintiff was required to prove that Gamer died on the morning of April 10th and that he died as the result of external and violent means. This proof was then aided by the presumption of law that his death was accidental, which, in the absence of contradictory proof, was sufficient to take the case to the jury. The evidence in this case was not only sufficient to take the case to the jury, but when taken as a whole it is debatable if it did not justify a directed verdict for plaintiff.

It must be conceded that

> "If the evidence is such that reasonable minds would draw different conclusions from it, it is a case for the jury."
>
> Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720.

> "A verdict should only be directed when the evidence is undisputed, or when it is of such conclusive character that a verdict to the contrary should be set aside."

See

Small Co. vs. Lanborn, 267 U. S. 248, 69 L. Ed. 597;

Murray Co. vs. Harrill, 51 Fed. (2d) 883, 884 (3 and 4).

With the above statements in mind we invite the Court's attention to the case of

Pythian Knights vs. Beck, 181 U. S. 49,

a case wherein the facts strongly suggested suicide, and the Court held:

> "Whether the deceased committed suicide was a question of fact and a jury is the proper trier of such questions."

The above is the last expression by this Court of the rule to be followed in cases of this kind.

See also

Missouri State Life vs. West, 67 Fed. (2d) 468.

Where evidence as to whether insured's death was accidental or suicidal is such that reasonable men might draw different conclusions, the question is properly submitted to a jury in actions on accident policies excluding liability in cases of suicide.

See

Fidelity & Casualty Co. vs. Pittinger, 63 Fed. (2d) 880;

Home Benefit Ass'n. vs. Sargent, 142 U. S. 691, 697, 701.

Under the heading

"SURMISE OR CONJECTURE WILL NOT SUSTAIN A JUDGMENT." (Petitioner's Brief, p. 51) counsel cite several authorities. With the cases cited we have no quarrel, but seriously question their applicability to the facts herein. A reading of them will disclose that those which involved the question of accident or suicide are easily distinguishable upon the facts,

while those which declare the law that surmise or conjecture will not sustain a judgment are in accord with our understanding of the rule of law. We seriously urge that the evidence in this case is so far different from that found in the cited cases that the rule announced does not here apply.

In this case there is a total absence of motive for or intent to commit suicide. A further and brief review of the facts will disclose the dissimilarity of the facts herein with those in the cases cited. The uncontradicted testimony shows the deceased to have been a man in the prime of life, happily married, devoted to his wife and daughter, in good health, a delightful companion, of good disposition and jolly demeanor, not involved in any affairs which would cause him mental concern, who contemplated a fishing trip upon which he was accustomed to carry a rifle or fire arm of some kind. This rifle is in a clothes closet which is overcrowded because of many clothes hanging therein, and lying upon the floor. The day before he tries to induce a friend to accompany him on the fishing trip; at breakfast he announces to his wife and child he is going fishing. He is dressed in his fishing clothes; he had no hat upon his head when he comes downstairs; subsequently when his body is found his head reposes in a hat. The room in which the body is found is so restricted as to space as to make it hardly possible to move about therein. The shells for the rifle from which the bullet was fired were in a drawer in the bureau in a bedroom adjoining the closet where the gun was discharged, which bedroom

was approximately 13 feet by 12 feet in dimensions. But one shell, and that one empty, was found in the rifle. When his body was found he was fully dressed. The question presents itself, why did he, if he was contemplating suicide, take the shell from the drawer in the bureau in the bedroom to the restricted confines of the clothes closet, there to load the rifle, when it would have been far easier to have taken the rifle to the bedroom, there load it and shoot himself? This would have dispelled any chance for a miscarriage of his plans. Why load the rifle with only one cartridge when more were available?

The further question presents itself, what was his purpose in putting his hat on his head? Furthermore, as was suggested by Judge Wilbur in his decision upon the first appeal of this case, "In considering whether or not death was suicidal or accidental, it should be observed that the preparations made by the insured for his hunting trip are entirely inconsistent with the idea that he was contemplating suicide, unless we assume that the deceased was deliberately intending to create the semblance of an accident with a view to assisting his widow in the collection of double indemnity upon his insurance policy. If such was his purpose, it would seem that a person of reasonable intelligence would realize that *a much more plausible appearance of accident could be simulated somewhere on the proposed fishing trip than in the small closet where the direction of the bullet could be readily traced.*" (Italics supplied.)

Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543.

Is it unfair to ask, when was the thought of suicide conceived? Was it on Sunday afternoon when he was urging his friend Geagan to go fishing with him; was it Sunday night when he sat conversing with his friend Anderson until 10:00 p. m.; was it Monday morning when he told his wife he was going fishing; was it while he was eating his usual breakfast; was it while he was playing with his child and pal; was it while he was drying the dishes his little girl was washing, or was it subsequent to all of this? Finally, the question must not only be asked, but petitioner must answer why did Walter Gamer want to commit suicide? The record herein is barren of an answer to any of these questions; consequently, to contend that a verdict other than the one rendered, was proper would defy reason and ignore the facts.

In this connection we desire to quote from the facts in

Pythian Knights Council vs. Beck, 181 U. S. 49.

"The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic who had worked in the family for two or three years, but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily his

reply was that 'a man that has as much trouble as he had, the sooner the end came the better,' and a similar remark at another time, that such a man 'would be better off dead than living.' Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single-barrel shotgun, belonging to his wife, and one a double-barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver who had brought the policeman called out that the deceased had gone into the back yard and into a water closet. The hack driver heard him go into the closet, and after a minute or so heard him step outside, and immediately the gun was discharged, and on examination he was found with the upper part of his head blown off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is

a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture."

The Court will observe that such facts very strongly indicated suicide; nevertheless, this Court held:

> *"At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the Court of Appeals, we are not justified in disturbing it."* (Italics supplied.)

In

Home Benefit Association vs. Sargent, 142 U. S. 691, 697, 701,

the facts were, deceased had been found with a bullet wound in his right temple, lying upon the bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle, and within a few inches of his right hand a pistol with three chambers discharged. The Court held the case was properly submitted to the jury and a judgment for the beneficiary affirmed.

The Court in the above case instructed the jury as follows:

> "The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is

void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defense. * * * When the policy of insurance was introduced with the evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that the defense has been established."

In the opinion is announced the following rule:

"The defendant having alleged in its answer that Hall's death was due to one of the causes excepted from the operation of the policy, it was not error for the Court to charge the jury that the defendant was bound to establish such defense by evidence outweighing that of plaintiff."

We have quoted at length from the two foregoing cases because they are decisions of this Court; also because the facts in each were strongly indicative of suicide, notwithstanding which that question was held to have been properly submitted to the jury.

The authorities seem to be in agreement upon the following propositions of law:

"The law presumes that all men are sane, and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death."

"The above presumption in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant the burden of producing evidence on the point."

See

37 C. J. 618 (415).

Also

"Where it is doubtful from the evidence that death was caused by an accident or by suicide, a presumption arises that an accident and not suicide was the cause of death."

14 R. C. L., Sec. 416, p. 1236.

See

22 C. J. 95 cited in
Conn. Life Co. vs. Maher, 70 Fed. (2d) 441.

In

Cooley's Brief on Ins. Vol. 6 p. 5454

we find the following:

"When the circumstances of death are such that it might have resulted from negligence, accident or suicide, the presumption is against death by suicide."

And on page 5460 we find the following:

"The defense relied on by appellant in this case is suicide or self-destruction and is an affirmative one, and the burden of proof is on appellant to show that the deceased intentionally took his life."

In each instance many authorities are cited in support of the text.

It is generally held, that the defense that death resulted from causes which by the terms of the policy relieved the insurer from liability thereunder, is a matter of affirmative defense, to be alleged by insurer in its answer.

This was an action on double indemnity on life insurance policies, where the insurance was reduced by one-half if the insured was employed in an underground mine. The point raised was that the complaint should have negatived such employment, but the complaint was held good, the burden being on the defendant to bring the case within the terms of the policy partially relieving it of liability.

Sullivan vs. Metropolitan Life Ins. Co., 96 Mont. 254, 266; 29 Pac. (2d) 1064.

Same rule is followed in,

Kingsland v. Metropolitan Life Ins. Co., 97 Mont. 558, p. 569, 37 Pac. (2d) 335.

In the following cases it is held that suicide is an affirmative defense, which must be pleaded by defendant in its answer to be available.

Vicars v. Aetna Life Ins. Co. (Ky.), 164 S. W. 106; 158 Ky. 1;

Dent v. National Life & Acc. Ins. Co. (Tex.) 6 S. W. (2d) 195;

American Central Life Ins. Co. vs. Alexander (Tex.), 39 S. W. (2d) 86.

It is for the jury to decide whether death was accidental, as neither suicide nor murder will be presumed

from the killing of an individual by gunshot wound.

McClur vs. N. Y. Life Ins. Co. (Dist. Ct. La.), 50 F. (2d) 972.

We now invite the Court's attention to three cases from the Ninth Circuit, wherein the question of suicide or accidental death was considered, and in which cases the Court held that the question was for the jury. The first case is

Metropolitan Life Ins. Co. v. Broyer, 20 Fed. (2d) 818, 820.

This is a case wherein the facts disclosed death was caused by asphyxiation. Judge Hunt in his decision used the following language so pertinent here.

> "The jury may have inferred that Broyer, while at the telephone, nervously reached up, and without meaning to do so, turned on the gas cock; or, that in pulling the telephone directory, which hung on the gas jet, he may have turned on the cock; or, that in going to the basin he may have staggered and laid hold of the jet and unintentionally turned on the cock; or that his senses may have been so muddled that he turned on the cock, believing it was the switch for the electric lights, any one of the circumstances enumerated is inferable, and warrants the conclusion that the gas cock was opened by Broyer with no intention of turning on the gas."

The next case in which the questions of law here involved were considered, is

Wells Fargo Co. vs. Mutual Life Ins. Co., 66 Fed. (2d) 890, 893,

in which case death also resulted from asphyxiation caused by monoxide gas. The District Court directed judgment for defendant, which judgment, in a decision by Judge Garrecht, was reversed and the case remanded for a new trial.

The decision cited with approval Metropolitan Life Ins. Company vs. Broyer, also the decision in the case of

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661.

The last case decided in the Ninth Circuit is the case of

Connecticut Life Ins. Co. vs. Maher, 70 Fed. (2d) 441;

and is the last expression by said Circuit Court upon the questions here involved. Judge Norcross, in his opinion, quotes extensively from the case of

Pythian Knights vs. Beck, 181 U. S. 49.

The facts in the Maher case disclose that decedent came to her death by falling to the pavement from the sixth floor of an apartment house. Decedent had been very nervous and much upset and upon numerous occasions had threatened suicide saying:

"Well, I will end it all." "I am going to finish this business, going to kill myself."

Other testimony disclosed a chair near the window from which the deceased fell or jumped. There were foot prints and finger prints on the window sill, the finger prints being of a sliding nature as if someone hung on the outside thereof and were on the outside

of the ledge, as was a foot print. Upon the day in question the fleet was coming into the bay of San Francisco.

The Court in concluding that the case was one for the jury and that a verdict for the plaintiff should be affirmed, said:

"Unless there is no reasonable hypothesis other than suicide to be deduced from the evidence submitted, the question of the occasion of death by accidental means remains one for the jury to determine."

The Court in its decision commented upon the following facts:

"With the possible exception of a hat the deceased was fully dressed for leaving the apartment, if such may have been her purpose. She left no written notes, or messages, which not infrequently is the act of one about to commit suicide." (Italics supplied.)

We quote the foregoing language because it is so very pertinent to the facts herein.

We now urge that the testimony offered by petitioner upon this trial is no different from that produced upon the first trial (opinion by Judge Denman, 328 R.), but is sadly lacking in its attempt to establish that the death of Walter Gamer was due to suicide.

The testimony of the additional witnesses produced by petitioner upon the second trial was cumulative, it consisted of expert testimony, the effect and value of which we have already discussed, and while it served to increase the volume of testimony, it did not change the fact situation from that which existed at the time of

the first appeal and decision of the Circuit Court of Appeals herein.

Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543.

We therefore contend the decision upon the first appeal becomes the law of the case, is controlling herein and binding upon this appeal. Petitioner has had his day in court. Insofar as the additional testimony is concerned we again refer to the fact that petitioner upon the former trial had available to it, but failed to use the witness McNeil. (222 R.)

That the decision upon the first appeal is now the law of the case we invite attention to the following cases:

Maryland Casualty Co. vs. City of South Norfolk, 54 Fed. (2d) 1032, 1039;

Minneapolis Steel & Machinery Co. vs. Federal Surety Co., 34 Fed. (2d) 270;

City of Seattle vs. Puget Sound Power & Light Co., 15 Fed. (2d) 794;

Cheasapeake & D. Ry. Co. vs. Mears, 70 Fed. (2d) 490;

Roberts vs. Cooper, 20 How. 467, 481, 15 L. Ed. 969;

U. S. vs. Axman, 193 Fed. 644;

Bodkin vs. Edwards, 265 Fed. 621;

Freeman vs. Smith, 62 Fed. (2d) 291;

General Motors Acceptance Corp. vs. Chev. Co., 74 Fed. (2d) 386;

Clairborne-Reno Co. vs. Du Pont Co., 77 Fed. (2d) 565;

Penn. Mining Co. vs. United Mine Workers, 28 Fed. (2d) 851;

Aetna Life Ins. Co. vs. Wharton, 63 Fed. (2d) 378;

Messinger vs. Anderson, 225 U. S. 436, 56 L. Ed. 1152;

Zurich G. A. & L. Co. vs. O'Keefe, 64 Fed. (2d) 768;

American Surety Co. vs. Bankers Savings & Loan Ass'n., 67 Fed. (2d) 803;

Jones vs. Box Elder County, 67 Fed. (2d) 900.

See also

Solberg vs. Sunburst Oil Co., 73 Mont. 94, 235 Pac. 761.

Anderson vs. Border, 87 Mont. 4, 285 Pac. 174;

Carlson vs. N. P. Ry. Co., 86 Mont. 78, 281 Pac. 913.

In the case last above cited the Supreme Court of Montana said:

> "While it is true that the volume of testimony introduced by the defendants on the second trial appears to be somewhat augmented, its legal effect is still the same, viz., such as to create a direct conflict usually presenting a problem for the jury to solve."

Upon the second appeal the Circuit Court of Appeals again held the evidence sufficient to warrant the action being submitted to the jury,

Gamer vs. N. Y. Life Ins. Co., 90 Fed. (2d) 817,

which, in connection with the verdict of the jury and the denial by the trial court of petitioner's motion for a new trial, should preclude petitioner from now asserting in this Court that the verdict was not justified.

"The right to limit liability turns upon whether such neglect was with the owner's privity or knowledge. Both courts below, after painstaking examination of the evidence, found there was such privity of knowledge and accordingly ruled that the claim for limits must be denied. We accept this concurring finding. There was sufficient evidence to support it."

Kellogg and Son vs. Hicks, 285 U. S. 502, 510, 76 L. Ed. 903, 911.

A verdict will be upheld if there is evidence which tends to sustain it.

U. S. vs. Copper Queen Min. Co., 185 U. S. 495; 46 L. Ed. 1008.

A verdict for plaintiff in an action for death should not be set aside on appeal for lack of evidence, unless under the testimony no recovery could be had on the facts shown in any view which could properly be taken of them.

Myers v. Pittsburgh Coal Co., 233 U. S. 184; 58 L. Ed. 906.

Conflicting evidence will not be weighed by the Supreme Court, and it will only determine whether there is sufficient evidence to sustain the verdict.

Troxell vs. Del. L. & W. Ry. Co., 227 U. S. 434; 57 L. Ed. 586.

Jury's finding on facts will stand unless reasonable men in exercising unprejudiced judgment would draw opposite conclusion from facts.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544.

Whether defendant's negligence was the immediate cause of the injury will not be passed on by the United State Supreme Court where there was evidence justifying the verdict.

Panama Ry Co. vs. Bosse, 249 U. S. 41; 63 L. Ed. 466.

Judgment will not be reversed where the conclusion was twice reached by the Circuit Court of Appeals that the evidence supports the verdict.

Chesbrough v. Woodworth, 244 U. S. 72; 61 L. Ed. 1000.

The concurrent findings of a federal District Court and the Circuit Court of Appeals that the verdict is supported by the evidence will be accepted by the United States Supreme Court unless clear error is shown.

C. R. I. & P. R. Co. v. Collins Products Co., 249 U. S. 186; 63 L. Ed. 552;

El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608, 53 L. Ed. 348;

Baugham v. N. Y. P. & N. Ry. Co., 241 U. S. 237, 60 L. Ed. 977.

WERE THE COURTS' INSTRUCTIONS ERRONEOUS?

The instructions having been set forth at some length in the brief of petitioner, we shall refrain from any repetition. We do, however, invite the Court's attention to the following portion of the Court's instructions:

> "Boiled down to its final essence, that is the question that you are called upon to decide,—Did Walter Gamer kill himself intentionally, and if Walter Gamer did not kill himself intentionally, this woman is entitled to $20,000.00—and if he did intentionally kill himself she is not entitled to any amount in excess of $10,000.00."

No instruction could more definitely inform the jury that the only issue for them to decide was, did or did not Walter Gamer commit suicide?

It will be observed that petitioner in their brief attempt to have this Court disapprove the rule heretofore announced in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661.

The cases in which it is claimed this Court disapproved of the ruling in the McConkey case are found on page 59 of petitioner's brief. *In none of these cases was the decision or rule announced in the McConkey case considered.*

In this connection we invite the Court's attention to the fact that the first of these cases, the so-called Turnipseed case, was decided December 19, 1910, while the last of these cases, Del Vecchio vs. Bowers, was decided December 9, 1935. Petitioner's brief in the Circuit Court of Appeals was served on July 7, 1936, and no reference is found in said brief to any of these cases except the Turnipseed case, which is referred to only because it is cited in a Circuit Court of Appeals decision. We regard this as of some significance, particularly as it is now urged with much force that said decisions, each and all,

overrule the rule announced in the McConkey case. No such contention was made until after the decision of the Circuit Court of Appeals herein. If their contention was meritorious would the able counsel representing petitioner have overlooked calling said cases to the Court's attention? It is our contention that the decision in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661,

is a correct statement of the law and has been so regarded during the many years intervening since the date of its rendition. The Court will observe from a comparison of the instructions given in the instant case with those in the McConkey case that the instructions here given were copied almost verbatim from those expressly approved in the McConkey case. Counsel for petitioner in their brief quote the first paragraph of the decision by Mr. Justice Harlan in that case, and from said paragraph seek support for their position herein. However, we invite the Court's attention to the following, likewise from that case, and being extracts from the instructions given therein.

> "The plaintiff exhibits the policy in evidence and gives evidence of the fact that the insured was found dead, within the life of the policy, from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and violent means,' and the only question is whether the means by which he came to his death were also 'accidental.' It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence, that

suicide cannot be presumed. The plaintiff is therefore entitled to recover *unless the defendant has by competent evidence overcome this presumption, and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.*" (Italics supplied.)

"The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant. (Italics supplied.) The presumption is that the death was not voluntary. "The court also said: "In order, therefore, to sustain the plea of suicide, the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred, and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

And further, the Court in its opinion said:

"Did the Court err in saying to the jury that upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? That question must be answered in the negative. (Italics supplied.) The condition that direct and positive proof must be made of death having been cause by external, violent and accidental means, did not deprive the plaintiff when making such proof, of the beenfit of the rules of law established for the guidance of courts and juries on the investigation and determination of facts."

The next case from this Court in which the question here involved was decided was the case of

Home Benefit Association vs. Sargent, 142 U. S. 691, 25 L. Ed. 1160,

in which the Court instructed the jury as follows:

"The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance or proof of the truth of this defense, * * * When the policy of insurance was introduced with evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that that defense has been established."

While it is true that said action was on a policy of life insurance containing certain exceptions in case of suicide, the language of the Court is nevertheless applicable herein.

Before entering into a discussion of the decisions of this Court which it is claimed by petitioner overrule the rule announced in the McConkey case, we suggest that none of said cases involve life or accident insurance, and reiterate that in none of said cases is the McConkey case considered or the rule there announced modified, disapproved or reversed. In this connection, we invite attention to the following well defined rules of law:

"A case is not overruled by an omission to mention it."

U. S. vs. Moreland, 258 U. S. 433, 436.

"The general language of a judicial opinion must be taken in connection with the point actually decided."

Sterling vs. Constantin, 287 U. S. 378.

"Always the language used in an opinion must be *read in the light of the issues presented.*" (Itlics supplied.)

Sinclair vs. U. S., 279 U. S. 479.

We also invite the Court's attention to the following from Judge Denman's decision herein:

"In refusing to accept such a silent submersion of the prior decision in the McConkey case, we are moved by the confusion into which the litigants and the legal profession would be thrown if the Supreme Court is deemed to overrule while it avoids the mention, much less the consideration of, a case which long ago established and has maintained a rule of law upon which they relied." (340, 341 R.) (Italics supplied.)

To supplement said statement may we ask, what would be the result if trial courts were put in error because of the giving of instructions theretofore definitely and expressly approved by this Court?

To now reverse the rule announced in the McConkey case would create a condition of uncertainty in the minds of trial judges and counsel, resulting in such confusion as to seriously hinder and delay litigation.

To review in detail the decisions of this Court relied upon by counsel for petitioner would unduly prolong this brief. Each of these cases were reviewed and dis-

tinguished by Judge Denman in his very able opinion herein.

Gamer vs, N. Y. Life Ins. Co., 90 Fed. (2d) 817.

There is not much we can add thereto. We believe his reasoning unanswerable, his interpretation of the various decisions in accord with well recognized rules and his conclusion as to the effect and intent of said decisions irrefutable.

A brief review of the cases relied upon by counsel for petitioner will now be indulged in. In the case of

Mobile, Jackson and Kansas City Railroad vs. Turnipseed, 219 U. S. 35, 55 L. Ed. 78,

this Court was called upon to consider the constitutionality of a law passed by the legislature of the State of Mississippi, which provided as follows:

> "In all actions against railroad companies for damages done to persons or property, proof of injuries inflicted by the running of the locomotives or cars of such company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

This Court upholding said statute said:

> "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, is but to enact a rule of evidence."

Whatever else is stated in said decision insofar as it pertains to the effect of a presumption must be held to

apply to the facts as therein presented and to relate only to the question as to whether or not a statute such as there involved violated certain constitutional provisions.

The Court did not therein consider the decision in the McConkey case.

In the case of

Atlantic Coast Line vs. Ford, 287 U. S. 502, 77 L. Ed. 457,

this Court, considering the presumption there under consideration, said:

> "Such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence."

As was pointed out by Judge Denman in his opinion referring to the above decision:

> "This distinction is summarized in Atlantic Coast Line R. Co. vs. Ford, 287 U. S. 502, 506, 53 S. Ct. 249, 250, 77 L. Ed. 457. There the Court compares the presumption casting the burden of proof on the party against whom it is raised in the case of Western & Atlantic R. R. v. Henderson, 279 U. S. 639, 643, 49 S. Ct. 445, 447, 73 L. Ed. 884, with the presumption which vanishes when the party against whom it exists goes forward with evidence tending to overcome it, recognized in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.), 226, Ann. Cas. 1912A, 463. The summary of the Henderson case is as follows: 'Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary in-

> ference of fact that *vanished* upon the introduction of opposing evidence. * * * That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail *unless such testimony is found* by the jury to preponderate.'" (Italics supplied.) (336, 337 R.)

The McConkey case was not considered in said decision.

In

> Western & Atlantic R. R. Co. vs. Henderson, 279 U. S. 639,

the question involved the constitutionality of a statute making a railroad company liable for damages to persons or property by the running of its locomotives or cars or other machinery * * *, unless the company made it appear that their agents have exercised all ordinary and reasonable care and diligence, *the presumption in all cases being against the company.* (Italics supplied.) During the trial of the action it appears from the opinion

> "Defendant offered much evidence tending to show that it and its employees exercised due care for the proper maintenance of track and crossing and in the operation of the train, and that neither it nor any employee was guilty of any negligence charged."

The Court in its opinion held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

The Court distinguished the statute under consideration from that considered in the Turnipseed case and held that the Mississippi statute created merely a temporary inference of fact which vanished upon the introduction of opposing evidence, while the Georgia statute imposed the burden of proof upon the railroad unjustly, and in violation of the Fourteenth Amendment. It will thus be seen the above case cannot be reasonably claimed to be authority for petitioner's contention herein. Furthermore, *the McConkey case was not considered or mentioned.*

The next case cited is that of

Heiner vs. Donnan, 285 U. S. 312, 76 L. Ed. 772.

The Court had under consideration the effect of a statute which provided that any transfer made by a decedent within two years prior to his death shall be deemed and held to have been made in contemplation of death within the meaning of the act in question, and any transfer of a material part of his property during said time shall, unless shown to the contrary, be deemed to have been made in contemplation of death. The Court held that the statute in question created a conclusive presumption incapable of being overcome by proof of the most positive character. The Court, in refusing to uphold the constitutionality of said section, considered the effect of presumptions, rebuttable and conclusive ones, and in the course of its opinion said:

> "A rebuttable presumption clearly *is a rule of evidence which has the effect of shifting the burden of proof.*" (Italics supplied.) (329 R.)

Thus it will be seen that this case sustains the position of respondent rather than that of the petitioner. In any event, that case likewise does not consider the decision in the McConkey case. See also

Lilienthal vs. U. S., 97 U. S. 237, 24 L. Ed. 901.

The last expression by this Court upon the question here involved is found in the case of

Del Vecchio vs. Bowers, 296 U. S. 280, 80 L. Ed. 229,

involving consideration of a section of the Longshoremen's and Harbor Workers' Compensation Act, U. S. C. A. Title 33, which created a presumption that the death of an employe was not suicidal. In the opinion written by Judge Denman in this case he considered the above case and quoted from the statute involved as follows:

> "In any proceeding for the enforcement of a claim for compensation, * * * it shall be presumed, *in the absence of substantial evidence to the contrary*—
>
> "(a) That the claim comes within the provisions of this chapter.
>
> "(b) That sufficient notice of such claim has been given.
>
> "(c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> "(d) That the injury was not occasioned by the wilful intention of the injured employee to injure or kill himself or another." (Italics supplied.)
>
> 33 U. S. C. A. 920.

The peculiar language of the statute will be noted. It is that death otherwise than by suicide "shall be presumed, in the absence of substantial evidence to the contrary." The Court holds that, where there is no "absence" but *presence* "of substantial evidence to the contrary," the presumption ceases to exist.

The Court confines it ruling to the limiting provision of the statute and is not ruling on the legal effect of the unrestricted presumption against suicide, stating (p. 286): "The *act under consideration,* however, does not leave the matter to be determined *by the general principles of law, but announces its own rule* * * *." (Italics supplied.) Certainly this has no application to a policy which specially *excepts* liability for suicide in the clause reading:

> "Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane;"

The presumption against suicide in the McConkey case is not of the character of the one created by the peculiar words of the statute of the Del Vecchio case. It is not controlled by the limiting words of the statute. Congress is dealing solely with employers' liability and its provisions for that statute cannot be construed as declaring a new rule of presumption in insurance cases. Under the McConkey case the presumption is one which continues to exist in the presence of evidence to the contrary of which there must be a "preponderance" produced by the insurer to overcome it. (339, 340 R.)

The Court, in the Del Vecchio case, supra, *does not mention the McConkey case.*

In addition to what has already been said regarding these cases, we respectfully invite the Court's attention to the decision of Judge Denman upon the appeal in this case,

90 Fed. (2d) 817 (336, 341 R.),

which clearly demonstrates that the foregoing decisions are not in conflict with the rule announced in the McConkey case; in fact make no mention of the decision in that case.

In concluding our review of said decisions may we again urge that the language used by the Court in the foregoing cases must be held to apply to the facts as therein presented.

> "The language of an opinion must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the case and which was decided."
>
> East Tennessee Company vs. I. C. C., 181 U. S. 1.

> "General principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case."
>
> Parsons vs. District of Columbia, 170 U. S. 45.

Counsel rely with great force upon the case of

Jefferson Standard Life Ins. Co. vs. Clemmer, 79 Fed. (2d) 724.

We concede that Judge Soper gave much consideration to the question here involved. We do not and cannot agree that he was justified in refusing to follow the

decision in the McConkey case. In the first place, in the Clemmer case the facts definitely established that the decedent had committed suicide. More than one motive therefor was apparent from the evidence—he had been drinking and was likewise suffering financial difficulties, thus, on the facts distinguishing that case from the case at bar.

In his decision Judge Soper admits that it is in conflict with the rule in the McConkey case, but attempts to justify its departure by the following statement:

> "The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant."

True, some Circuit Courts of Appeal have refused to follow the rule in the McConkey case, but were such Courts justified in their refusal; by what right did they ignore or refuse to follow the McConkey decision? In the case at bar both the District Court and Circuit Court of Appeals chose to and did follow the law as announced in the McConkey decision. Were they in error in so doing? We do not believe this Court is inclined to encourage either District or Appeals Courts in an urge to overrule the decisions of this Court.

The fallacy of the reasoning therein may perhaps be best illustrated by a review of two decisions cited therein and stated to announce a rule of law at variance with the rule in the McConkey case. We refer to the cases of

Holt vs. U. S., 218 U. S. 245, 253,

and

Agnew vs. U. S., 165 U. S. 36.

A reading of these cases will disclose that neither is an authority for the position of the learned judge who wrote the decision in the Clemmer case.

In the Holt case the defendant requested an instruction that the law presumed the defendant innocent, and added:

> "This presumption of innocence is evidence in the defendant's favor."

Mr. Justice Holmes held that the trial judge had correctly informed the jury regarding the presumption of innocence which surrounded the defendant, and in the course of his opinion stated that the concluding sentence of the tendered instruction would have a tendency to mislead the jury.

In the Agnew case an instruction was tendered by the defendant regarding a presumption, the concluding sentence of which was:

> "This presumption is to be treated by you as evidence, giving rise to resulting proof to the full extent of its legal efficacy."

and Mr. Chief Justice Fuller said that the tendered instruction had been covered by instructions given and might well have been refused because of the tendency of its closing sentence to mislead. Thus it will be seen that neither of these cases are authority for the position assumed by Judge Soper in his contention that said decisions at least impliedly justified the conclusion that this Court was departing from the rule announced in the McConkey case. In neither case was the McConkey decision considered.

Furthermore, in

Heiner vs. Donnan, 285 U. S. 312,

already referred to, this Court announced that a rebuttable presumption is a rule of evidence which has the effect of shifting the burden of proof, thus again placing this Court in disagreement with the decision in the Clemmer case.

We concede that in some of the decisions cited by counsel for petition some Circuit Courts of Appeal have not followed the decision in the McConkey case. We believe that the language of the Court in

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80;

Certiorari denied N. Y. Life vs. Ross, Exec., 279 U. S. 852,

speaks far more eloquently than would or could any language of ours in refutation of the right of District or Circuit Courts to refuse to allow the rule announced in the McConkey case. Therein it is said:

> "The charge to the jury in the court below was manifestly carefully prepared with these authorities in mind. *So far as we are advised, the McConkey case has never been qualified nor overruled in this circuit. The former is binding upon this court, and both were binding upon the District Court.* (Italics supplied.) The doctrine announced in both thus becomes the law of all cases presenting the identical question. The situation is a most appropriate one for application of the doctrine of stare decisis. If this doctrine means, as was said in the Madrid (C. C.) 40 F. 677, 679, *'That when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases,'*

precedents which cannot be distinguished should be followed until modified or overruled, and the interests of uniformity, certainty, and stability in the law thus promoted. (Italics supplied.) Certainty of a rule is often of equal importance with theoretical accuracy.

"We are unable to satisfactorily distinguish the case of Travelers' Ins. Co. vs. McConkey in the Supreme Court, or more especially Standard Life, etc. Co. v. Thornton, in this Circuit, from the present action, and although, except for these cases, the charge would not seem to us properly to apply the abstract principle of law, we cannot say that the Court erred in following the doctrine announced in the decisions.

The judgment must therefore be affirmed."

In a concurring opinion by Circuit Judge Dennison, he said:

"In this case, as in the McConkey case, it seems to me that, in spite of the protestations to the contrary, the burden of proof—the risk of nonpersuasion—was shifted to defendant. As I read the charge of the trial court in the McConkey case, it was that the burden of proof to show accident, rather than suicide, was on the plaintiff, but that if the evidence of each was equally balanced, 'the law was for the plaintiff.' The Supreme Court approved both of these conclusions, plainly not regarding them as inconsistent; but the conflict of view revealed by the cases cited in Judge Hickenlooper's opinion shows that the two conclusions are not easy to reconcile."

In

Standard Life and Accident Co. vs. Thornton,
100 Fed. 582,

Judge Day, later Mr. Justice Day, in discussing the presumption against suicide, said:

"This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. *It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony.*" (Italics supplied.)

Counsel next cite the cases of

Travelers' Insurance Co. vs. Wilkes, 76 Fed. (2d) 701, 705;

Fidelity and Casualty Co. vs. Driver, 79 Fed. (2d) 713;

New York Life Ins. Co. vs. Trimble, 69 Fed. (2d) 849.

In none of these cases was the McConkey case considered. The facts in each showed definitely that the decedent committed suicide. In the Wilkes case the facts showed that the weapon used was held against or very close to the head, more than one shot was fired by the decedent, "the cabin walls showed the marks of another bullet. At the beginning of the year the decedent had been sued by his wife for divorce she alleging intoxication and cruel treatment. On the Saturday before his death the insured had been drinking. On the Tuesday and Wednesday before his death he did not appear for work. He stayed in his cabin Tuesday night, Wednesday and Wednesday night sent his servant to get two pints of whiskey. After his death two empty pint bottles and an empty quart bottle, which had contained liquor were found in his room. A few days before his death, in discussing a case of disappearanee, decedent had said in substance; the only way to disappear

was to blow one's brains out. The muzzle of the gun was against the head of the insured or too near it even to burn the hair and he was prone on the bed when the fatal shot was fired."

In view of the foregoing facts, the Court in its opinion said:

> "The two shots, whether the other one followed immediately or was fired previously, cannot be accounted for by any reasonable theory of two unintended discharges. Under the evidence in the record no reasonable conclusion can be reached other than that the insured was intentionally shot, either by his own or by some other person's hand."

It would seem unnecessary to further quote from said case in order to differentiate the facts therein from those in the case at bar.

This is likewise true of the case of

Fidelity & Casualty Co. vs. Driver, 79 Fed. (2d) 713.

Notwithstanding that the facts strongly suggested suicide, the Court nevertheless held that it presented a question for the jury under proper instructions. The case was reversed because of what the Court regarded as improper instructions.

In the Trimble case the decedent had prepared and sent in ahead of time a statement of salary to be due him for the unexpired first half of the month; he had remained alone in the office and killed himself after his companions left him, and while they were at supper he took the clip out of the pistol and laid it on the bed beside him, either for the purpose of taking no chances

of shooting himself more than once, or of creating an impression that his death was accidental. The pistol was held against or very close to his right temple. The Court held that such facts indicated suicide.

To review each case cited by counsel for petitioner in detail would serve no good purpose. We will not further prolong this brief by so doing. We do, however, desire to briefly review some of the former decisions of the Circuit Court of Appeals for the Ninth Circuit, which are relied upon by counsel for petitioner.

The first case cited is

United States F. & G. Co. vs. Blum, 270 Fed. 946,

which it is claimed is in conflict with the ruling in the case at bar. In that case a verdict for plaintiff was affirmed. There was no question involved regarding instructions. It is true that the McConkey case is cited, but the Court's construction of the rule announced by the McConkey decision shows that the Court of Appeals misconstrued the purport of that decision and is decision is in direct conflict with the rule therein announced.

The case of

Ariosi vs. Orient Ins. Co., 50 Fed. (2d) 548

is next cited. The decision therein was written by Judge Wilbur, and Judge Wilbur concurred in both decisions in the case at bar.

In the case of

New Amsterdam Casualty Co. vs. Breschini, 64 Fed. (2d) 887,

the opinion was written by Judge Wilbur *but did not mention or discuss the decision in the McConkey case.* The fact that the decision in the Breschini and Ariosi cases were written by Judge Wilbur, who concurred in the decision in the case at bar, indicates far more forcibly than any language of ours that he did not consider the law as therein announced in conflict with the rule announced in this case or with that announced in the McConkey case.

Judge Denman in the decision herein discusses somewhat at length some decisions from the Ninth Circuit, wherein the questions here involved were considered, including those decisions claimed by counsel for petitioner to be in conflict with the rule announced in the case at bar. We invite attention to that portion of the decision where such discussion is had. (333, 336 R. Inc.) It is an effectual answer to every contention of petitioner.

A comparatively recent case decided by the Supreme Court of Washington reviews a great many of the decisions in which the question of burden of proof is discussed. We refer to the case of

Selovers vs. Aetna Life Ins. Co., 38 Pac. (2d) 1059,

in which the Court, after an exhaustive review of the authorities, held that the burden of proof was on the *insurer.*

In 6 Cooley's Briefs on Insurance (2d Ed.), page 5454, under the title "Suicide As an Excepted Risk," the author states:

"As a defense based on the condition making suicide an excepted risk is an affirmative one, the *burden of proof that the insured committed suicide is on the insurer.*" (Italics supplied.)

See

37 C. J. 618 (415).

The authorities seem to be in agreement upon the following propositions of law;

"The law presumes that all men are sane, and possessed of the love of life; are animated by the instincts of self preservation and the natural desire to avoid presonal injuries and death.

"The above presumption in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant the burden of producing evidence on the point."

See

Fidelity Co. vs. Weise, 55 N. E. 540, 541; 182 Ill. 496.

It is likewise held by the overwhelming weight of authority, that

"Where a person came to death by violence and it might have resulted from accident, homicide, negligence, natural causes, or suicide, the presumption is in favor of death by one of such other causes and against death by suicide. Therefore the burden of proving death by suicide as a defense is on defendant."

See

37 C. J. 618 (415)

Also

"Where it is doubtful from the evidence that death was caused by an accident or by suicide, a presumption arises that an accident and not suicide was the cause of death."

14 R. C. L., Sec. 416, p. 1236.

See also

22 C. J. 95 cited in
Con. Life vs. Maher, 70 Fed. (2d) 441.

A very recent case is

New York Life vs. Miller, 81 Fed. (2d) 263 (decided Dec. 9, 1935),

in which the Court of Appeals for the District of Columbia says:

"It is settled law that a suicide clause in a policy of insurance must be given effect according to the terms of the contract, but, being an affirmative defense, the burden of proof is upon the insurance company, and the evidence on this point must outweigh the evidence of the plaintiff."

We have not attempted to review all the authorities in which this question has received consideration. To do so would unnecessarily extend this brief.

The policy here in question was made and delivered in Butte, Montana (See Par. 3 of Comp. and Par. 1 of Answer) (4, 26 R.).

Section 725 U. S. C. A. Title 28 provides:

> "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The statutes of Montana may therefore be helpful and we shall now proceed to invite the Court's attention to such statutes which we regard as being in point, their construction, as well as certain decisions of the Montana Supreme Court which we regard as being in point.

The Montana statute provides for certain disputable presumptions, one of which is: "A person takes ordinary care of his own concerns."

Sec. 10606 (28) Rev. Codes of Mont., 1935.

The Montana Code defines a presumption as follows: "A presumption is a deduction which the law expressly directs to be made from particular facts."

Sec. 10602 Rev. Codes of Mont. 1935.

The Supreme Court of Montana in considering the foregoing presumption, said:

> "While this is a disputable presumption, it has the *effect of evidence.*" (Italics supplied.)
>
> State vs. District Court, 72 Mont. 213, 232 Pac. 201, 203 (3).

In

> Arnold vs. Genzberger, 31 Pac. (2d) 296, 305 (14)

it is said:

"The burden of proving ratification was upon the plaintiffs throughout the case, for the burden of proof, when once determined, is not changed in any aspect of the cause, *except by legal presumption,* and this burden remains throughout the trial." (Italics supplied.)

Citing 2 Jones on Ev. (2d Ed.) 859.

A statutory disputable presumption is satisfactory if uncontradicted.

Renland v. First National Bank, 90 Mont. 424, 4 Pac. (2d) 488.

The statute commands that it must be followed if uncontroverted.

Sec. 10604, R. C. M. 1935.

Whether sworn testimony to the contrary is sufficient to rebut such a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelming against the presumed facts and permit of but one rational and reasonable conclusion.

Renland v. First National Bank, supra;

McMahon vs. Cooney, 25 Pac. (2d) 131, 95 Mont. 138.

Under the provisions of

Sec. 10600, R. C. M. 1935,

"A presumption is indirect evidence." (Italics supplied.)

Sec. 10604, R. C. M. 1935, provides:

> "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; *but unless so controverted, the jury are bound to find according to the presumption.*" (Italics supplied.)

In the case of

> Nichols vs. New York Life, 88 Mont. 132, 292 Pac. 253,

the Supreme Court of Montana said:

> "Plaintiff's contention is that there is a presumption against suicide and in favor of accident. While this is not one of the presumptions specifically mentioned in our statute, the adjudicated cases abundantly support the contention that such presumption exists."

And in the case of

> Maki vs. Murray Hospital, 7 Pac. (2d) 228, 232; 91 Mont. 251,

the Supreme Court of Montana, referring to presumptions said:

> "The explanation of the circumstances given by the defendant must be satisfactory to overcome the prima facie case made, and unless the evidence is such as to come within the rule in Nichols vs. New York Life Ins. Company, the question is clearly for the jury."

In the Maki case (above) the Supreme Court of Montana also announced the following rule in discussing the effect of a presumption:

> "Here, the law provides the plaintiff with a case on which he is entitled to recover, unless the defendant *explained away the presumed negligence.*" (Italics supplied.)

It will no doubt be conceded that where death was caused by violent and external causes plaintiff aided by the presumption against suicide has established a prima facie case in his favor.

In

State vs. Nielson, 57 Mont. 137, 187 Pac. 639,

it was held:

> "The testimony constituting a mere contradiction of the facts established presumptively by the prima facie case does not necessarily suffice to overthrow the same."

See also

10 R. C. L., p. 868.

In

Union Bank & Trust Co. vs. State Bank, 103 Mont. 260, 62 Pac. (2d) 677, 684,

the Montana Supreme Court said:

> "We recognize the rule that a presumption has the effect of evidence and that whether sworn testimony to the contrary is sufficient to rebut it is a question for the triers of fact."

Our code further declares:

> "The jury, subject to the control of the Court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions.
>
> They are not bound to decide in conformity with the declaration of any number of witnesses, which

do not produce a conviction in their minds, against a less number, or *against a presumption* or other evidence satisfying their minds." (Italics supplied.)

Sec. 10672 (2) R. C. M. (1935).

Our research does not disclose any interpretation of the foregoing statute by the Montana Courts, but California has an identical statute, and in a very early case had occasion to consider the effect of this provision in the case of

People vs. Milner, 54 Pac. 833, 837; 122 Cal. 171,

wherein it is said:

"By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the fact—*First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it.* It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled." (Italics supplied.)

The foregoing rule was quoted with approval in

Reclamation Dist. vs. Sherman, 105 Pac. 277, 285 (Calif.), 11 Cal. App. 399.

In

Standard Accident Co. vs. Kiker, 165 S. E. 850 (Ga.),

it is said:

> "There exists a strong presumption that a person found dead from gunshots died naturally or accidentally and presumption is against suicide."

In the case of

Smellie vs. So. Pac., 299 Pac. 529 (Cal.), 212 Cal. 540,

it was held:

> "Where a presumption arises in favor of a party which is not overcome by evidence produced and offered by that party, *it remains as evidence before the jury until a verdict is reached.*" (Italics supplied.)

We invite the Court's attention to the discussion contained in the Smellie case because of the very exhaustive review of the authorities regarding the weight to be given a presumption. In that case the Court holds that not only is a presumption evidence, but that in certain cases it may outweigh positive evidence adduced against the presumption.

If it be conceded, as it must be, that the law presumes Mr. Gamer did not commit suicide, it becomes essential to further consider what weight must be attached to this presumption.

The rule is probably best stated in the case of

Black vs. So. Pac. Co. (Cal.), 12 Pac. (2d) 981,

where the Court says:

> "Presumptions have the effect of evidence and, unless controverted, the jury is bound to find in accordance therewith."

And again in

Gray vs. Fred B. Neuhoff Co. (Cal.), 12 Pac. (2d) 1036,

it is stated:

"That a presumption constitutes evidence and may be considered as such by the Court is so well settled by recent cases that we do not need to cite them."

See

Graybill vs. Con. Ass'n., 60 Pac. (2d) 167 (Calif.).

There are many other cases to the same effect, but we content ourselves with citing the following cases sustaining the rules above quoted, viz:

Gayton vs. Pac. Fruit Express, 15 Pac. (2d) 217;

Reclamation District vs. Sherman; 105 Pac. 277;

Pitt vs. So. Pac. Ry. Co., 9 Pac. (2d) 273;

Grantham vs. Ordway, 182 Pac. 73, 76; 40 Cal. App. 758;

Olsen vs. Standard Oil Co., 204 Pac. 293; 188 Cal. 20;

Mar Shee vs. Maryland Casualty Co., 210 Pac. 269; 190 Cal. 1;

Stafford vs. Martinoni, 221 Pac. 919; 192 Cal. 724;

Re Jolly's Estate, 238 Pac. 353; 196 Cal. 547;

Gillilan vs. Portland Cremeation Ass'n., 249 Pac. 627 (Ore.), 120 Ore. 286.

In

Phillips vs. Cuccio, 442 Pac. (2d) 1050, 1051 (Calif.),

it is said:

> "Respondent rests his side of the question upon the claim that the ownership of the automobile by the mother raised a presumption that the son drove the machine with her consent and for her purposes, and that even in the face of contradictory testimony the court could, if it doubted the credibility of the testimony, base its finding upon the presumption alone. This view is sustained by Randolph vs. Hunt, 41 Cal. App. 739, 746, 183 P. 358; Hathaway v. Mathews, 85 Cal. App. 31, 39, 258 P. 712; Perry v. A. Paladini, Inc., 89 Cal. App. 275, 282, 264 P. 580; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747; Rapolla v. Goulart, 105 Cal. App. 417, 422, 287 P. 562; Bushnell v. Vashiro, 115 Cal. App. 563, 565, 2 P. (2d) 550, and Strasburger v. Prescott, 111 Cal. App. 104, 295 P. 357. To hold otherwise would be to say that a presumption ceases to exist whenever testimony in contradiction is received. Neither a court nor a jury is bound to decide in conformity with the testimony of witnesses and against a presumption. Code Civ. Proc. 2061, subd. 2.

WAS PETITIONER PREJUDICED?

If it should be held that the rule of law as announced in the McConkey case should be overruled we contend the judgment herein should nevertheless be affirmed for the following reasons, viz:

1. The evidence points irresistibly to the fact that the death of Walter Gamer was accidental; consequently,

upon neither the facts nor the law is petitioner entitled to prevail.

2. If the Court's charge as to the burden of proof was erroneous petitioner was not prejudiced thereby.

In support of the foregoing, we again invite a review of the evidence. This will demonstrate that viewing the evidence produced by petitioner in its most favorable light, it would not justify a finding that the death of Walter Gamer was due to suicide. Furthermore, nothing contained in the evidence produced by respondent would aid petitioner in its contention. The record herein conclusively establishes that the facts are inconsistent with suicide and consistent with accident.

We also urge an utter absence of any motive for suicide. As stated by Judge Wilbur upon the first appeal of this case: "Under the evidence the jury would have been justified in finding that there was *no motive for suicide.*" (Italics supplied.)

In

Tschubi vs. Met. Life Ins. Co., 72 Fed. (2d) 306,

it was said:

> "There is an entire absence of any motive for self-destruction. * * * While it is possible that the deceased committed suicide, *it seems unreasonable that he did without a motive to do so.*" (Italics supplied.)

See also

Conn. Life vs. Maher, 70 Fed. (2d) 441.

We come now to a consideration of the question as to whether or not petitioner was prejudiced by the charge of the Court, assuming for the sake of argument only, that the Court is no longer willing to follow the rule announced in the McConkey case.

Counsel for petitioner concede that the presumption that death was accidental was sufficient to compel it to "go forward with its proof." The Court having instructed the jury that the burden of proof was thereafter on petitioner, was this prejudicial error? We invite attention to the case of

> Smith vs. Hollander, 259 Pac. 958, 960; 85 Cal. App. 535,

wherein the Supreme Court of California in considering an instruction which said

> "After proof of plaintiff's prima facie case, the burden then shifts to the defendant to show she was not guilty of negligence."

held that

> "'Burden of proof' and burden of producing evidence' are not the same, but the use of the one expression instead of the other has been held not to be error."

In

> Hansen vs. Ore.-Wash. R. & Nav. Co., 188 Pac. 963, 970, 97 Oregon 190,

the Oregon Supreme Court said:

> "It is not improper to say that the 'burden of proof' shifts from one party to the other when that phrase is employed to express the idea that it is

incumbent upon a named party to *go forward with the evidence on a given question.*" (Italics supplied.)

In the instant case the burden of proof was, at the beginning of the trial, upon the respondent, who alleged in her complaint that death resulted from "bodily injury effected solely through external, violent and accidental means." (6 R.) The respondent produced proof that Walter Gamer's death was the result of bodily injuries effected through "external and violent means." The law thereupon aided respondent by the presumption that under such circumstances death was accidental. The Court instructed the jury regarding this presumption:

> "As I told you in the beginning the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you that the presumption is not according to the fact."

With the foregoing instruction in mind we invite attention to the following statement by the Missouri Court of Appeals in

Stofer vs. Dunham, 208 S. W. 641, 644.

> "It is true the term 'burden of proof' has two meanings. By one of them is meant the obligation to establish the truth of a claim or a cause of action by a preponderance of the evidence, and this rests throughout on the party asserting it and never shifts;

by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial to make or meet a prima facie case. But as to negligence (which was only one of the necessary elements of plaintiff's cause of action), did not the establishment of the fact of a collision fulfill plaintiff's obligation in reference to the burden of proof, as used in the first sense above mentioned, unless the defendants were able to make the jury believe they were not negligent."

Said language is very pertinent to the facts here. The fact that death resulted from external and violent means, aided by the presumption, fulfilled respondent's obligation with reference to the burden of proof and the court's instructions, taken as a whole, so informed the jury.

To the same effect see

Alabama & V. Ry. Co. vs. Groome, 52 So. 703, 704 (Miss.).

In

Re Barber's Estate, 22 L. R. A. 90, 94, 63 Conn. 393,

it was said:

"The term 'burden of proof' is, after all, and no matter how important it has become through universal adoption and use, a mere form or figure of speech. Accordingly, as one view or another of its significance has been held, one style or the other of these seemingly inconsistent expressions has been used to denote entirely consistent meanings."

See also

Packard vs. O'Neil, 262 Pac. 881, 886 (Idaho).

We now invite the Court's attention to the fact that the rule announced in the McConkey case, either right or wrong, has been without modification since 1888. The policy here in question was executed on December 29, 1926. The policy having been written after the decision in the McConkey case, is it unreasonable to contend that the insurance company in writing it knew and had in mind said decision and the duty imposed upon the company in all cases where the question at issue was, did the insured die as a result of self-destruction or accident? It was within the power of the company to protect itself against the effect of the ruling in the McConkey case.

Bubany vs. New York Life Ins. Co., 51 Pac. (2d) 864, 871 (New Mex.).

Fidelity & Casualty Co. vs. Lowenstein, 97 Fed. 19, 38 C. C. A. 29.

In the foregoing discussion we have made no mention of objections to the right of petitioner to urge error in the giving of the Court's instructions. In view of the fact that these objections have been discussed at length in our brief heretofore filed herein in opposition to the granting of the Petition for Writ of Certiorari, we shall not indulge in any repetition of the argument therein advanced or the authorities cited. We believe such objections to have been meritorious and invite the Court's

attention to pages 18 to 25 of our former brief on file herein, wherein the authorities are collected in support of such objections.

We respectfully submit that the decision of the Circuit Court of Appeals herein was and is in accord with the law as announced in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691;

Supreme Lodge Knights of Pythias vs. Beck, 181 U. S. 49,

and that the judgment herein should be affirmed.

As was said in

Gilman vs. Philadelphia, 3 Wall. 713

"A rule of law once vested by the Court should be firmly adhered to unless clearly erroneous."

In concluding our argument, may we urge the following:

Walter Gamer died April 10, 1933. He carried with the New York Life Insurance Company a policy of insurance containing the usual provisions regarding double indemnity. He paid $10.00 annually for this benefit. The Company refused to pay in excess of the face value of the policy. Suit was instituted on July 18, 1933. Upon the first trial the beneficiary was denied the right to have a jury determine the questions involved, with

the result that she was compelled to seek redress from the Circuit Court of Appeals.

Gamer vs. Prudential Life Ins. Co., et al., 76 Fed. (2d) 543,

which reversed the action of the trial judge and sent the case back for trial; trial was had, resulting in a verdict for the beneficiary. Motion for a new trial was denied; an appeal was again taken to the Circuit Court of Appeals for the Ninth Circuit, which upheld the verdict of the jury.

New York Life Ins. Co. vs. Gamer, 90 Fed. (2d) 817.

Thereafter this Court granted a Writ of Certiorari, and the case is now here for review. Almost five years have elapsed since the death of Mr. Gamer, during which time respondent's claim has not been paid, while litigation involving its payment continues. The Prudential Insurance Company, a party to the action at the time of the first appeal, having satisfied the claim of respondent, has not been involved either during the second trial or upon subsequent appeals.

If the rule in the McConkey case was not a correct expression of the law, and this, of course, we do not admit, should the beneficiary, respondent herein, be penalized by being compelled to again litigate this claim? We submit the rule in the McConkey case is a correct expression of the law and was followed by the trial judge in his instructions to the jury. If this Court should decide that the rule therein announced should be

modified or reversed, then we urge that a reading of the record herein will disclose that the evidence irrefutably points to death by accident; consequently, no prejudice was suffered by petitioner, and the judgment should be affirmed.

Respectfully submitted,

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Service of the within and foregoing Brief by copy admitted this.....day of.....

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Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 323.—October Term, 1937.

New York Life Insurance Company, Petitioner, vs. Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 14, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

April 10, 1933, the deceased died by gunshot. Petitioner had insured his life by a policy on which it agreed to pay his executors ten thousand dollars upon proof of death without regard to its cause, or twenty thousand dollars in case of death resulting from accident as defined by a provision the pertinent parts of which follow. "The Double Indemnity . . . shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means . . . Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane."

Respondent sued petitioner in a state court for twenty thousand dollars. There being diversity of citizenship, defendant removed the case to the federal court for the district of Montana. The complaint alleges that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and did not result from self-destruction but directly from the accidental discharge of a rifle.

Defendant's answer concedes that plaintiff is entitled to the face of the policy, and alleges a deposit of that amount with interest in court. It denies that death resulted from bodily injury effected through accidental means; and specifically denies that it resulted from the accidental discharge of a rifle or other fire-arm. And "as an affirmative defense," it alleges that the death of the insured resulted from self-destruction by intentionally discharging a loaded rifle into his body with intent to take his life.

The case came on for trial and, at the close of the evidence, the judge on motion of defendant directed the jury to return a verdict in its favor. Plaintiff appealed; the circuit court of appeals held that the question whether the death was accidental should have been submitted to the jury, and reversed the judgment. 76 F. (2d) 543. At the second trial plaintiff went forward; at the close of all the evidence defendant requested the court to direct a verdict in its favor, insisting that plaintiff had failed to prove accidental death and that the evidence showed death was caused by self-destruction, and was not sufficient to sustain a verdict for the plaintiff. The court denied the motion and submitted the case to the jury.

Its charge contained the following:

"In this case the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight of the evidence, is upon the defendant. The presumption of law is that the death was not voluntary and the defendant . . . . must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary.

"Ordinarily . . . . in the absence of a plea by the defendant of suicide or self-destruction the burden would be upon, and it still is upon, the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer . . . the . . . Company has admitted that . . . [he] died through external and violent means. . . . The question remains as to whether the death was accidentally caused, or the means of the death was accidental or whether it was suicide. But when the defendant took the position that it takes here it assumed the burden of proving to you by a preponderance of evidence that Walter Gamer killed himself voluntarily. . . .

"The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary . . . ."

The jury gave plaintiff a verdict for twenty thousand dollars with interest, and the court entered judgment in her favor for that amount. Defendant appealed, alleging that the trial judge erred in denying its motion for a directed verdict and in giving each of the quoted instructions. The circuit court of appeals af-

firmed. 90 F. (2d) 817. This Court granted a writ of certiorari. — U. S. —. There are presented for decision, questions whether the trial court erred in refusing to direct a verdict for defendant or in giving any of the instructions quoted above.

The circuit court of appeals has twice held the evidence sufficient to sustain a verdict for plaintiff. It found that the facts brought forward at the second trial are not substantially different from those presented on the first appeal. There is no substantial controversy as to the principal evidentiary circumstances upon which depends decision of the controlling issue, whether the death of the insured was accidental. As we are of opinion that the trial court erred in giving the challenged instructions, and the judgment is to be reversed and the case remanded to the district court where another trial may be had, we refrain from discussion of the evidence. We find it sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction.

The form and substance of the challenged instructions suggest that the trial judge followed those brought before this Court in *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661. The opinion of the circuit court of appeals reads that case to require approval of the instructions here in question. As it has not been uniformly interpreted, we shall examine its principal features. There the accident policy sued on covered bodily injuries effected through external, violent and accidental means when such injuries alone occasioned death or disability. A proviso declared that no claim should be made under the policy when the death or injury had been caused by suicide, or by intentional injuries inflicted by the insured or by any other person. The complaint alleged that the insured had been accidently shot by a person or persons unknown to plaintiff, by reason of which he instantly died. The answer denied that death was occasioned by bodily injuries effected through external, violent and accidental means, and alleged that it was caused by suicide, or by intentional injuries inflicted either by the insured or by some other person.

The statement of the case quotes the following instructions:

"The plaintiff . . . gives evidence of the fact that the insured was found dead . . . from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and vio-

lent means,' and the only question is whether the means by which he came to his death were also 'accidental.'

"It is manifest that self-destruction cannot be presumed . . . The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.

"Neither is murder to be presumed . . . but if the jury find . . . . that the insured was in fact murdered, the death was an accident as to him . . . . If . . . . the injuries of the insured . . . were not intentional on his part the plaintiff has a right to recover . . . . The inquiry . . . is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part.

"The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant."

This Court held that the trial judge erred in charging that if the insured was murdered plaintiff was entitled to recover and on that ground reversed the judgment and remanded the case with directions to grant a new trial.

It was not necessary to consider any other question. But, for guidance of the trial ordered, the Court discussed other parts of the charge.

At the outset the opinion declares that under the issue presented by the general denial it was incumbent on plaintiff to show that the death was the result not only of external and violent, but also of accidental means. It states that the two "principal facts to be established were external violence and accidental means, producing death. The first was established when it appeared that the death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive . . . Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy . . . did not extend to . . . self-destruction. . . ."

The opinion proceeds (p. 667): "Did the court err in saying to the jury that upon the issue as to suicide the law was for the plaintiff unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition

that direct and positive proof must be made of death having been caused by external, violent and accidental means did not deprive the plaintiffs, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts."

The statement just quoted, lacking somewhat of the precision generally found in opinions of the Court prepared by its eminent author, has been variously construed. The question it propounds does not fully reflect the substance of the charge which put on the defendant the burden of proving suicide by preponderance of the evidence. However, the opinion shows that the burden was on plaintiff to prove death by accident as defined in the contract. It contains nothing to suggest that the court deemed the issue as to burden of proof arising on general denial to be affected by defendant's allegation of suicide. It held that if the insured committed suicide, plaintiff had no claim; that, from the fact of death by violence, accident would be presumed, and that unless the presumption was overcome by evidence the law was for plaintiff. The opinion does not indicate the quantum of proof required to put an end to the presumption. It is consistent with, if indeed it does not support, the rule that the presumption is not evidence and ceases upon the introduction of substantial proof to the contrary. Thayer, Preliminary Treatise on Evidence, p. 346. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, 642, 644. *Heiner* v. *Donnan,* 285 U. S. 312, 329. *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 506. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286. *Nichols* v. *New York Life Ins. Co.,* 88 Mont. 132, 139 *et seq.* The opinion did not definitely sustain any of the charges to which it referred. It falls far short of sustaining the instructions challenged in the present case.

Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on plaintiff to allege and by a preponderance of the evidence to prove that fact. The complaint alleged accident and negatived self-destruction. The answer denied accident and alleged suicide. Plaintiff's negation of self-destruction taken with defendant's allegation of suicide served to narrow the possible field of controversy. Only the issue of accidental death *vel non* remained. The question of fact to be tried was precisely the same as if plaintiff merely alleged accidental death and defendant inter-

posed denial without more. *Travellers' Ins. Co.* v. *Wilkes*, 76 F. (2d) 701, 705. *Fidelity & Casualty Co. of New York* v. *Driver*, 79 F. (2d) 713, 714. Cf. *Home Benefit Association* v. *Sargent*, 142 U. S. 691.

Upon the fact of violent death without more, the presumption, i. e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travellers' Ins. Co.* v. *McConkey, supra*, 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. *Despiau* v. *United States Casualty Co.*, 89 F. (2d) 43, 44. *Jefferson Standard Life Ins. Co.* v. *Clemmer*, 79 F. (2d) 724, 730. *Travellers' Ins. Co.* v. *Wilkes, supra*, 705. *Fidelity & Casualty Co. of New York* v. *Driver, supra*, 714. *Frankel* v. *New York Life Ins. Co.*, 51 F. (2d) 933, 935. *Ocean Accident & Guarantee Corp.* v. *Schachner*, 70 F. (2d) 28, 31. But see: *New York Life Ins. Co.* v. *Ross*, 30 F. (2d) 80. *Tschudi* v. *Metropolitan Life Ins. Co.*, 72 F. (2d) 306, 308, 310. *Nichols* v. *New York Life Ins. Co., supra.*

In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties.

The challenged instructions cannot be sustained.

Judgment reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 323—October Term, 1937.

New York Life Insurance Company, Petitioner, *vs.* Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 14, 1938.]

Mr. Justice Black, dissenting.

The judgment below rests upon an insurance policy contract made in Butte, Montana. Plaintiff filed suit for more than $3,000 in a Montana state court, and the insurance company—because it was not a Montana corporation—was able to remove the suit to the Federal District Court. Plaintiff's judgment in the District Court was affirmed by the Court of Appeals. This Court now reverses plaintiff's judgment because the District Court instructed the jury that—evidence having established the death of the insured by violent and external means—the law presumed from these facts that the death "was not voluntary and . . . . the defendant must overcome this presumption and satisfy the jury by a preponderance of the evidence, that his death was voluntary. . . ." The policy of insurance was a Montana contract and even though the company was able to remove plaintiff's case to a Federal court, I believe the plaintiff's rights should be determined by Montana law. Under Montana law I believe the above instructions were proper.

The Supreme Court of Montana has said:[1]

"Where, as here, death is shown as the result of *external and violent means* and the issue is whether it was due to accident or suicide, the *presumption is in favor of accident.*"

The majority agree with the Montana law up to this point, saying:

"Upon the fact of *violent death without more, the presumption,* i. e., the applicable rule of law, *required the inference of death by accident rather than by suicide.*"

[1] Nichols *v.* New York Life Ins. Co., 88 Mont. 132, 140.

At this point, agreement ends between the rule here declared by the majority and the law of Montana.

Under Montana law the presumption that violent death was accidental and not suicidal continues and does not disappear unless the evidence "*all* points to suicide . . . with such certainty as to preclude any other reasonable hypothesis"; and the presumption continues for the jury's consideration except " . . . when the evidence points overwhelmingly to suicide as the cause of death."[2]

Contrary to this clear statement by the Montana Supreme Court is the different rule clearly announced by the majority here in holding that the presumption disappears after the insurance company introduced evidence merely "*sufficient to sustain* a finding that the death was not due to accident."

This Court does not find that the evidence in this case excludes every other reasonable hypothesis but suicide or that all of the evidence points "unerringly to suicide as the cause of death."[3] On the contrary the majority opinion states:

"We find it (the evidence) sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction."

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[2] Nichols *v.* New York Life Ins. Co., *supra*, at 141. In a case involving an action on an insurance policy, in which the *McConkey* case, *supra*, was followed, the Supreme Court of Montana said:

"'The testimony as to the incidents connected with the death of the insured is slight, but is sufficient to establish the death of insured by external and violent means. . . .

" . . . . if plaintiff had 'shown by the fair weight of the evidence that the assured came to his death as the result of a pistol shot . . . , then the law will presume that the shot was accidental, and that it was not inflicted with murderous or suicidal intent. And under such circumstances the burden will be upon the defendant to overcome this presumption, and to show that the death was not caused by accidental means.'

"It is apparent, therefore, that under the great weight of authority plaintiff's evidence made a *prima facie* case. As said by this court in numerous decisions, when a *prima facie* case is made by plaintiff, the defendant must rebut the case so made, or fail in the action." Withers *v.* Pacific Mutual Life Insurance Co., 58 Mont. 485, 491, 492, 493, 494.

"Testimony constituting a mere contradiction of the facts established presumptively by the *prima facie* case does not necessarily suffice to overthrow the same. . . . the *prima facie* case must not only be contradicted but overcome as well. When such case is made, contradictory testimony merely amounts to a conflict in the evidence, with the ultimate facts to be determined by the court or jury, as the case may be." State *v.* Nielsen, 57 Mont. 137, 143. Cf. Johnson *v.* Chi. Ry. Co., 52 Mont. 73. See, Renland *v.* First Nat. Bank et al., 90 Mont. 424, 437.

[3] Cf. Nichols *v.* New York Life Ins. Co., *supra*, at 144.

It is obvious that the majority here declare a rule based neither on Montana law nor Federal statute. This Federal judicial rule must none the less be followed in suits on insurance policies tried in Federal courts. The result is that suits on policies for less than $3,000 tried in state courts will frequently be decided by rules different from the rule which governs similar suits tried in Federal courts because they involve more than $3,000. In an orderly and consistent system of jurisprudence, it is important that the same law should fix and control the right of recovery on substantially identical contracts made in the same jurisdiction and under the same circumstances. Neither the company nor the policy holder should obtain an advantage by the application of a different law governing the contract merely because the case can be removed to a Federal court.

It was to avoid such results—among other reasons—that Section 725, U. S. C., Title 28, was passed. It provides:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In this case, the law determining the burden of proof as to suicide affects the substantial rights of the parties.[4] Substantial rights arising from an insurance contract are governed by the law of the state where the contract is made.[5] Since the court below instructed the jury in accordance with the law of Montana, I do not believe the charge constituted reversible error.

Nor can I agree that we should approve a general rule governing trials in Federal courts which in my judgment transfers *jury functions* to judges. The effect of the decision here is to give the trial judge the right to decide *when sufficient evidence has been introduced to take from the jury* the right to find accidental death from proof of death by violent and external means. This inevitably follows if the presumption, or right of the jury to infer death by accident, "disappears" whenever the judge believes sufficient evidence of suicide has been introduced.

Stripped of discussions of legal formulas designated as "presumptions" and "burden of proof", the net result of the rule of "disappearing presumptions" is that trial judges in Federal courts

[4] Cf. Central Vermont Railway Co. v. White, 238 U. S. 507, 511, 512; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371, 372.

[5] Pritchard v. Norton, 106 U. S. 124, 130; Northwestern Life Insurance Co. v. McCue, 223 U. S. 234, 246, 247.

(irrespective of state rules) have the power to determine when sufficient "substantial evidence" has been produced to justify taking from the jury the right to render a verdict on evidence which—had the judge not found it overcome by contradictory evidence—would have justified a verdict. The judge exercises this power as a "trier of fact" although evidence, previously introduced and sufficient to support a verdict, has neither been excluded nor withdrawn.

Proof of death by external and violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this *proof of accidental death* was based on "presumption", in reality —whatever words or formulas are used—what is meant is that a litigant has offered adequate evidence to establish accidental death. To attribute this *adequacy of proof* to a "presumption" does not authorize or empower the judge to say that this "adequate proof" (identical with legal "presumption") has "disappeared". If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere *contradictory* evidence cannot overcome the original "adequate proof" unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof. The *jury* —not the *judge* —should decide when there has been "substantial" evidence which overcomes the previous adequate proof. Here, this Court holds that at the conclusion of plaintiff's evidence the jury had adequate proof upon which to find accidental death, and which would authorize a verdict that insured died as a result of accident, but also holds that, after subsequent contradictory evidence of defendant, the judge (not the jury) could decide that plaintiff's adequate proof (presumption) had "disappeared" or had been overcome by this subsequent contradictory testimony. This took from the jury the right to decide the weight and effect of this subsequent contradictory evidence. Such a rule gives parties a *trial by judge,* but does not preserve, in its entirety, that *trial by jury* guaranteed by the Seventh Amendment to the Constitution. I cannot agree to a conclusion which, I believe, takes away any part of the constitutional right to have a jury pass upon the weight of *all of the facts* introduced in evidence.

I believe the judgment of the court below should be affirmed.